(a)

No. 83-2166-ASX
Status: GRANTED

Title: Philip Q. Zauderer, Appellant
v.
Office of Disciplinary Counsel of the Supreme Court of Ohio

Docketed:
July 2, 1984

Court: Supreme Court of Ohio

Counsel for appellant: Morrison, Alan B.

Counsel for appellee: Gagliardo, Angelo J.

Entry	Date	Note	Proceedings and Orders
1	Jul 2 1984	G	Statement as to jurisdiction filed.
2	Aug 1 1984		Brief of appellee Off. of Disciplinary Counsel of Sup. Ct. of Ohio in opposition filed.
3	Aug 1 1984		DISTRIBUTED. September 24, 1984
4	Oct 1 1984		PROBABLE JURISDICTION NOTED.
			**********
5	Nov 5 1984		Joint appendix filed.
6	Nov 13 1984		Brief of appellant Philip G. Zauderer filed.
7	Nov 15 1984	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
8	Dec 3 1984		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
9	Dec 4 1984		SET FOR ARGUMENT. Monday, January 7, 1985. (2nd case)
10	Dec 6 1984		CIRCULATED.
11	Dec 13 1984	X	Brief of appellee Office of Discip. Counsel filed.
12	Dec 14 1984	X	Brief amicus curiae of A. H. Robins Company, Inc. filed.
13	Dec 20 1984		Record filed.
14	Jan 2 1985	X	Reply brief of appellant Philip G. Zauderer filed.
15	Dec 24 1984		Record filed.
16	Dec 24 1984		Record filed.
17	Jan 7 1985		ARGUED.

Office - Supreme Court, U.S.
FILED
JUL 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2166

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

ALAN B. MORRISON
(Counsel of Record)
DAVID C. VLADECK

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

DAVID K. FRANK

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

QUESTIONS PRESENTED*

1. May a state, consistent with the First Amendment, discipline a lawyer under its anti-solicitation rules for running a truthful newspaper advertisement informing women injured by an allegedly defective medical device that it may not be too late to bring suit, offering to represent them in such litigation, and agreeing to represent approximately 100 women who contacted him in response to the ad?

2. May a state, consistent with the First Amendment, discipline a lawyer for placing an advertisement which contains an accurate drawing of an allegedly defective medical device and which states that the lawyer is available to accept cases involving that device on a contingent fee basis, on the grounds that (a) the state considers any illustration other than a picture of a lawyer or a portrayal of the scales of justice to be inherently misleading, and (b) the state contends that, in every advertisement for contingent fee representation, a lawyer must state the specific percentages to be charged and describe the manner in which costs will be handled?

3. May a state, consistent with the Due Process Clause of the Fourteenth Amendment, discipline a lawyer on the ground that he placed a misleading advertisement, where the state (a) completely changes its theory of why the ad is misleading after the trial has been concluded, and (b) bases its finding that the ad was misleading on "general knowledge which can be determined from Municipal Court reports to the [Ohio] Supreme Court," where the reports were neither introduced in evidence nor previously mentioned in the proceedings?

---

* There are no parties to this proceeding other than those listed in the caption. The Ohio Newspaper Association, the Dispatch Printing Company, and the American Civil Liberties Union Foundation of Ohio, Inc., appeared as *amicus curiae* in support of appellant in the Supreme Court of Ohio.

CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION OF THIS COURT 1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 2
STATEMENT OF THE CASE 3
1. Statement of Facts 3
2. The Charges 6
3. The Board Decision 9
4. The Decision of the Supreme Court of Ohio 12
THE QUESTIONS PRESENTED ARE SUBSTANTIAL .. 13
A. This Appeal Presents Important Questions Under the First Amendment 14
1. The Anti-Solicitation Charges (Question 1) 15
2. The Content Restriction Charges (Question 2) .. 18
B. Appellant's Due Process Claims as to the Drunk Driving Ad Are Substantial 21
CONCLUSION 24

APPENDIX A — Opinion of the Supreme Court of Ohio in *Disciplinary Counsel v. Zauderer*, issued April 4, 1984 ..... 1a
APPENDIX B — Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, adopted June 24, 1983 ..... 8a
APPENDIX C — Order of the Ohio Supreme Court imposing public reprimand on appellant, entered April 4, 1984 ..... 22a
APPENDIX D — Notice of appeal filed in the Supreme Court of Ohio, May 31, 1984 ..... 24a
APPENDIX E — Ohio Disciplinary Rules 27a

TABLE OF AUTHORITIES

Cases: **Page**

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) ..... 4, *passim*
Bolger v. Youngs' Drug Products Corp.,
103 S.Ct. 2875 (1983) 15, 18
Cafeteria Workers v. McElroy,
367 U.S. 886 (1961) 23
Carey v. Population Services International,
431 U.S. 678 (1977) 18
Central Hudson Gas & Elec. Corp v. Public Service Comm'n,
447 U.S. 557 (1980) 14, 15, 17, 18, 20
Cole v. Arkansas,
333 U.S. 196 (1948) 22
DeJonge v. Oregon,
299 U.S. 353 (1937) 22
Durham v. Brock,
498 F. Supp. 213 (M.D. Tenn. 1980) 14
Greene v. McElroy,
360 U.S. 474 (1959) 23
In re Primus,
436 U.S. 412 (1978) 16
In re R.M.J.,
455 U.S. 191 (1982) ..... 4, *passim*
In re Ruffalo,
390 U.S. 544 (1968) 21-22
In the Matter of Disciplinary Proceedings Against Marcus,
107 Wis.2d 560,
390 N.W.2d 806 (1982) 19
Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977) 17
Matter of Discipline of Appert & Pyle,
315 N.W.2d 204 (1981) 4, 17

Page

Morgan v. United States,
304 U.S. 1 (1938) 22
Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 11, 16, 17
Richardson v. Perales,
402 U.S. 389 (1971) 22
Spencer v. Honorable Justices of the Supreme Court of Pennsylvania
579 F. Supp. 880 (E.D.Pa. 1984) 17
State v. Schaffer,
649 P.2d 355 (Okl. 1982) 16
Thompson v. Louisville,
362 U.S. 199 (1960) 22
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 17
Wolff v. McDonnell,
418 U.S. 539 (1974) 22

Constitutional Provisions, Statutes, and Rules:

United States Constitution
First Amendment ..... 2, *passim*
Fourteenth Amendment 3, 10, 21, 23

28 U.S.C. § 1257(2) 2
28 U.S.C. § 1257(3) 2
28 U.S.C. § 2103 2
28 U.S.C. § 2403(b) 2

Rules, United States Supreme Court
28.4(c) 2
Rules of the Supreme Court of Ohio
Disciplinary Rule 2-101(A) ..... 2, *passim*
Disciplinary Rule 2-101(B) ..... 3, *passim*

Page

Disciplinary Rule 2-101(B)(15) 7, 10, 20
Disciplinary Rule 2-101(B)(16) 20
Disciplinary Rule 2-101(B)(17) 20
Disciplinary Rule 2-103(A) 3, 8, 10, 15, 16, 18
Disciplinary Rule 2-104(A) 3, 8, 11, 16, 18
Disciplinary Rule 2-106(C) 6, 7, 9, 21
Rules for the Government of the Bar, Rule V 12

Other Authorities

Wright, Miller, Cooper, & Gressman,
Federal Practice and Procedure,
§ 4016 (1977) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio issued on April 4, 1984, is set forth in Appendix A (App. 1a-7a) and is reported at 10 Ohio St. 3d 44, 10 OBR 308, and 461 N.E. 2d 883. The Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, adopted on June 24, 1983, are set forth in Appendix B (App. 8a-21a) and are not officially reported.

JURISDICTION OF THIS COURT

This is an appeal from a final order disciplining a lawyer for placing two newspaper advertisements. The first two questions presented draw into question the validity of three Rules for the Government of the Bar of Ohio, issued by the Supreme Court of Ohio, including several subparts of one of

them. Appellant contends that, as applied to one of his two ads, the Rules are invalid under the First Amendment to the United States Constitution. The order of the Ohio Supreme Court imposing a public reprimand on appellant was entered on April 4, 1984 (App. C, 22a-23a) and a notice of appeal was filed on May 31, 1984, in the Supreme Court of Ohio (App. D, 24a-26a). Because 28 U.S.C. § 2403(b) may be applicable to this appeal, a copy of the notice of appeal was served on the Attorney General of Ohio. See Rule 28.4(c) of the Rules of this Court. Jurisdiction in this Court is based on 28 U.S.C. § 1257(2).

The third question presented relates to the Supreme Court of Ohio's finding of a violation of Disciplinary Rule 2-101(A) as to the other of appellant's ads. As to the finding of misconduct regarding that ad, which was also entered on April 4, 1984, appellant alleges a violation of the procedural due process protections of the Fourteenth Amendment, but does not challenge the validity of Rule 2-101(A). Accordingly, for that claim alone, this Court would have only certiorari jurisdition under 28 U.S.C. § 1257(3). However, because this Court has appellate jurisdiction under 28 U.S.C. § 1257(2) with respect to questions 1 and 2, it has appellate jurisdiction over the third question as well. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure,* § 4016 (1977) and cases cited therein.

If the Court determines that an appeal is not proper in this case, it is requested that the papers be regarded and acted on as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .

The pertinent provisions of Rule V of the Rules for the Government of the Bar of Ohio, DR 2-101(A), DR 2-101(B), DR 2-103(A), and DR 2-104(A), are set forth in Appendix E (App. 27a-29a).

STATEMENT OF THE CASE

1. Statement of Facts

This appeal challenges the public reprimand imposed on appellant for placing two different newspaper advertisements. Because the principal focus of the disciplinary proceeding was on the ad which was placed second in time, and because the charges relating to the other ad apparently would not have caused Disciplinary Counsel to commence proceedings against appellant, we will first describe the second ad, which is the subject of questions 1 and 2.

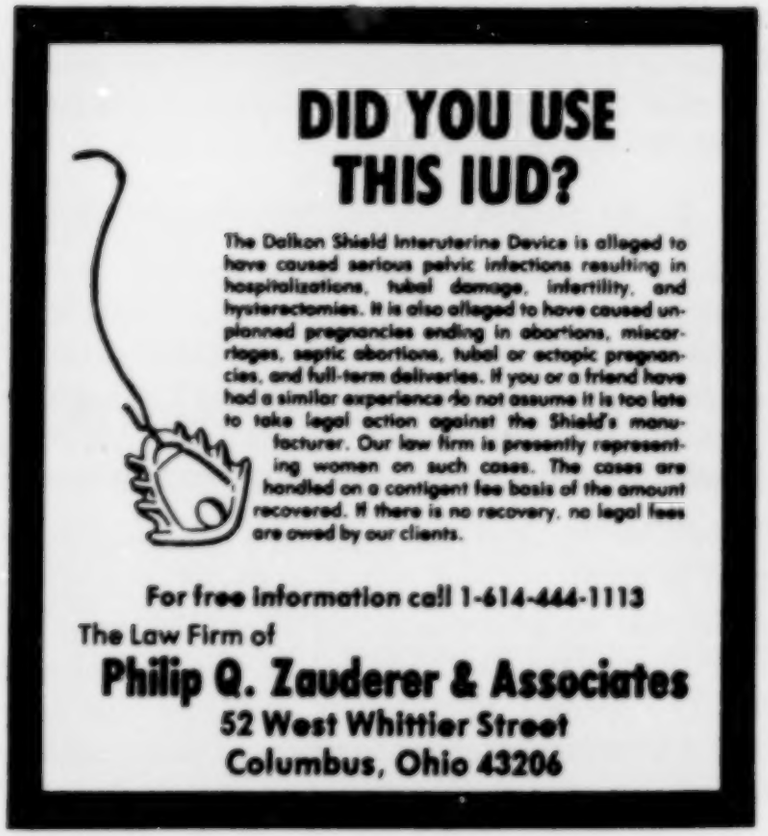
Appellant Philip Q. Zauderer has been a member of the Ohio Bar since 1964. His office is located in Columbus, Ohio, where he engages principally in plaintiffs' personal injury and product liability work. Prior to this proceeding he had no involvement with the disciplinary process.

Beginning in May, 1981, appellant wrote and met with members of the staff of the appellee Office of Disciplinary Counsel of the Supreme Court of Ohio, which is designated by that Court to enforce the attorney disciplinary rules which are embodied in Rule V of the Rules for the Government of the Ohio Bar. Appellant was interested in placing an ad similar to one which attorneys in Minnesota had run, which advised women who had utilized the Dalkon Shield as a birth control device and who had suffered injuries as a result, that it may not be too late to bring an action against the manufac-

turer of the device to recover damages for those injuries. The Minnesota ad contained a drawing of the Dalkon Shield, stated that the law firm was representing a number of women on a contingent fee basis, and gave telephone numbers and the address of the firm. Eventually, counsel for appellee advised appellant that his ad would not comply with Disciplinary Rule 2-101(B), and he did not run the ad.

Two events occurred which rekindled appellant's interest in running the Dalkon Shield ad. On December 17, 1981, the Minnesota Supreme Court in *Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204, ruled that the Dalkon Shield brochures and letters issued by those lawyers were protected by the First Amendment, and on January 25, 1982, this Court issued its opinion in *In re R.M.J.,* 455 U.S. 191, which expanded the protections previously given to lawyer advertising under the First Amendment in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

Appellant then met with a member of appellee's staff to discuss his proposed advertisement in light of these decisions. The meeting was inconclusive, in part because appellee is not authorized to issue advisory opinions, and in part because the parties agreed that there were items in appellant's proposed ad that were not specifically covered in *R.M.J.* However, because appellant believed that the Constitution permitted him to do so, he decided to run the following ad, which was virtually identical to the ad that he had discussed with the staff of appellee:



DID YOU USE THIS IUD?

The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates

52 West Whittier Street

Columbus, Ohio 43206

Between March 10, 1982, and May 22, 1982, this ad ran in 36 Ohio newspapers with a combined circulation of 1,860,160. As a result, approximately 235 individuals contacted appellant. Of these he filed lawsuits on behalf of 95 individuals, on a contingent fee basis, seeking recovery for damages as a result of their use of the Dalkon Shield.

The other advertisement run by appellant appeared for two days only, on November 25 and 26, 1981, in *The Columbus Citizen Journal.* It provided as follows:

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

On November 26, appellant received a telephone call from a member of appellee's staff regarding the ad. The call advised appellant that his ad contained an offer to accept a criminal case on a contingent fee basis, which was prohibited by DR 2-106(C). Appellant immediately withdrew the ad, wrote appellee a letter, and declined to represent two individuals who contacted him after reading the ad.

2. The Charges

This disciplinary proceeding was commenced by the filing of a complaint by appellee on July 29, 1982. The principal focus of the complaint, which alleged a violation of various provisions of the Disciplinary Rules, was on the Dalkon Shield ad.[1]

Count IV asserted that the ad violated DR 2-101(B) because it contained a number of items of information, including the description of a particular legal problem, which were not included in the all-inclusive "laundry list" of matters which may be advertised under that Rule. The same Count alleged that the ad also violated DR 2-101(A), which prohibits false

[1]Because Counts I and VII did not allege any independent substantive violations, and because neither the Board nor the Court found a violation under Count VI, the allegations in those Counts will not be described.

and misleading advertising, but the complaint gave no specifics to support that charge. In Count V, appellee alleged that, because the ad containing a drawing of a Dalkon Shield, it violated DR 2-101(B), which prohibits any illustrations other than a picture of the lawyer or a portrayal of the scales of justice.

Although more than eight months had passed since appellant had run and, at appellee's request, cancelled the "drunk driving" ad, he was also charged with violations based on it in Counts II and III. The theory of both counts was that appellant had offered to handle drunk driving cases on a contingent fee basis. Thus, appellee alleged in Count II that appellant violated DR 2-101(B)(15) because his ad did not contain the information required by that provision relating to contingent fee cases. In Count III, appellee charged that, since DR 2-106(C) forbids contingent fees in criminal cases, appellant's ad could not be fulfilled, and hence was false, fraudulent, misleading, and deceptive in violation of DR 2-101 (A).

The parties entered into a detailed stipulation of facts on September 13, 1982, and on the same date appellant filed a motion to dismiss. His accompanying memorandum dealt principally with his assertion that the publication of the Dalkon Shield ad could not be prohibited consistent with the First Amendment. As to the drunk driving ad, he argued that, since it was not an offer to handle a case on a contingent fee basis, it was not subject to the disclosure requirements of DR 2-101(B) (15), and for the same reason did not violate the prohibition against contingent fees in criminal cases in DR 2-106(C). That motion was denied, and on December 17, 1982, appellee filed an amended complaint.

The principal purpose of the amended complaint was to add two new counts based on the Dalkon Shield ad. Count VIII focused on the fact that the ad stated that the representation would be on a contingent fee basis, but failed to contain any statement as to how such fees were to be computed. According to appellee, DR 2-101(B)(15) requires that all adver-

tisements regarding contingent fees must disclose whether percentages are computed before or after deduction of court costs and expenses. Since appellant did not include that information (indeed, he included no rate information at all, but simply stated that his representation would be on a contingent fee basis), he was alleged to have violated that Rule. Appellee also charged that failing to include the information regarding the computation of the contingent fee was "likely to mislead the public" and hence was a deceptive statement in violation of DR 2-101(A).

The final Count charged violations of DR 2-103(A) and DR 2-104(A), the anti-solicitation provisions of the Ohio Code of Professional Responsibility. The first of these sections prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer, and according to appellee, appellant violated that provision because his ad recommended his own employment. The other provision, DR 2-104(A), prohibits an attorney from accepting employment after giving unsolicited legal advice to an individual to take legal action, and was also allegedly violated by the publication of the Dalkon Shield ad and appellant's acceptance of clients who responded to it.

Appellant answered the amended complaint on January 14, 1983, and raised the First Amendment, as well as numerous other defenses, to each of the charges involving the Dalkon Shield ad. Paragraph 46 of his answer quoted paragraph 30 of the stipulation of September 13, 1982, in which the parties agreed that:

> The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

The parties entered into another stipulation of facts on May 24, 1983, and on that date a hearing was held before a three-member panel of the Ohio Board of Commissioners on Grievances and Discipline.

At the hearing appellee offered in evidence three stipulations, copies of the two advertisements, and appellant's letter concerning the drunk driving ad. Appellant was also called to testify, but only regarding the Dalkon Shield ad. Appellee offered no evidence in support of the constitutionality of the Rules and indeed argued that appellant should not be permitted to do so either. Thereafter, appellant called a number of witnesses to testify, *inter alia,* to the value of advertising and illustrations in general and to the importance of the illustration in this ad as a means of communicating effectively with women who may have been injured by the Dalkon Shield. On June 13, 1983, the parties filed post-trial briefs, and on June 24 the Panel issued its decision, which was adopted by the whole Board except as to the recommended punishment.

3. The Board Decision

The Board, which is composed of seventeen members of the Ohio Bar who are appointed by the Ohio Supreme Court, first addressed the drunk driving ad. Appellee had based its case in Counts II and III on its position that the ad was an offer to take a contingent fee matter in a criminal case, which is forbidden by DR 2-106(C). However, the Board found no violation based on this provision, since appellant had merely placed an ad and DR 2-106(C) prohibits entering into a contingent fee agreement in a criminal case, which appellant had not done (App. 12a). The Board nonetheless found a violation of the prohibition against misleading advertisements in DR 2-101(A) because:

> It is general knowledge which can be determined from Municipal Court reports to the Supreme Court that, in disposing of driving while intoxicated (OMVI) charges, in many cases, the charge is reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court. In that manner, the defendant would not be "convicted of drunken driving," and the legal fee would not be refundable. (App.11a).

There was, however, no evidence in the record to support such a finding. In addition, the Board's theory of liability had never been urged by appellee, and thus appellant had no opportunity to offer evidence or present other defenses to it. Accordingly, in his August 24, 1983 brief to the Supreme Court of Ohio (pp. 76-82), appellant specifically argued that these departures from the charges brought by appellee constituted a violation of the Due Process Clause of the Fourteenth Amendment.

The Board also ruled that appellant's Dalkon Shield ad violated the Disciplinary Rules. First, it found that appellant had violated DR 2-103(A) (which it erroneously referred to as DR 2-102(A)), because the ad "implicity [sic] recommended that readers of the advertisement employ him or an associate before any reader sought his advice regarding employment of a lawyer" (App. 13a), a charge which, if sustained, would apply to virtually every ad any lawyer has ever placed.

As to the charge alleging insufficient disclosures of appellant's contingent fee arrangement, the Board sustained the charge on two separate grounds, one of which had not previously been asserted by appellee. It agreed with appellee that a lawyer who mentions contingent fees in an ad must include all of the contingent fee rate information which is noted in DR 2-101(B)(15) and that appellant had not done so (App. 14a). The Board also found that the ad was misleading, and hence in violation of DR 2-101(A), since it failed to disclose that the client would be liable for costs and expenses even if she did not prevail, and thus allegedly left the impression that the client would owe nothing. *Id.* Once again, like the drunken driving finding, this charge had never previously been made, and appellant had no opportunity to defend himself against it.[2]

---

[2]Unlike the other violations regarding the Dalkon Sheld ad, the failure to include appellant's contingent fee rates and to state the client's obligation to pay costs could readily have been cured, with no adverse effect on the overall thrust of the ad, if appellee had indicated that there was a problem. So far as the record discloses, appellee's staff never raised the issue of contingent fee disclosures at the

Next, as to the inclusion of the Dalkon Shield drawing, the Board found a violation of DR 2-101(B) and then offered a number of reasons why the prohibition against the use of nearly all illustrations was appropriate. The principal basis for the Board's conclusion was that:

> evidence and general knowledge with respect to newspaper, magazine, and television advertising make it clear that the use of illustrations can be the cause of misunderstanding, misleading interpretation of an advertisement, distraction from reading or understanding the significant messages of the verbal portion of an advertisement and in general, color the reaction of the viewer to the advertisement (App. 14a-15a).

The Board found it to be "not unreasonable" to prohibit appellant's illustration, while allowing a lawyer to include a picture of himself or of the scales of justice (App. 15a).

Finally, the Board agreed with appellee that the statement that it was "not . . . too late to take legal action against the Shield's manufacturer," coupled with appellant's subsequent agreements to represent those who responded to the ad and requested his services, violated the prohibition in DR 2-104(A) against offering legal advice and accepting employment based on it (App. 15a).

The Board next turned to the constitutional considerations, principally by reciting the holdings in *Bates v. State Bar of Arizona,*, 433 U.S. 350 (1977) (*"Bates"*), *In re R.M.J.*, 455 U.S. 191 (1982) (*"R.M.J."*), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and quoting extensively from the *Ohralik* opinion in upholding the application of the Rules to these ads (App. 15a-18a). The Board then stated its conclusions and gave its recommendation. Whereas the Panel had recommended a public reprimand, the Board, although adopting all of the Panel's findings and conclusions, recommended

---

March 1982 meeting or at any other time. Indeed, this allegation was first made in December 1982 when appellee filed its amended complaint.

that appellant be indefinitely suspended from the practice of law (App. 20a).[3]

4. The Decision of the Supreme Court of Ohio

The Supreme Court of Ohio affirmed each finding of a violation by the Panel and the Board. Its brief opinion contained very little discussion of appellant's claims that the Board has not properly interpreted the Disciplinary Rules, and it made no mention of the due process claims that appellant had raised. It briefly touched on the First Amendment issues, discussing only the *Bates* and *R.M.J.* decisions. It correctly noted that neither case entirely precluded states from regulating lawyer advertising, but then stated that the Rules here met the requirements of advancing a substantial state interest and were narrowly drawn (App. 6a-7a). It then announced its conclusion that all of the Rules which had been called into question were reasonable and could constitutionally be applied to the Dalkon Shield ad. Although the Court recognized that appellant had introduced "a substantial amount of evidence . . . respecting the value of advertising to the public, and the unique value of respondent's Dalkon Shield advertisement in light of the public's limited awareness of the danger of that particular device . . ." (App. 2a-3a), it made no effort to weigh, as part of its First Amendment analysis, the benefits derived from the ad, including the fact that nearly 100 women learned of their rights and found a lawyer who agreed to represent them on a contingent fee basis.

The Court did not, however, adopt the punishment recommended by the Board, but instead imposed a public reprimand, as the Panel had suggested (App. 7a). The Court also imposed costs of $1,043.63 against appellant (App. 23a), and

[3]Under Ohio law, the minimum punishment for a violation of a Disciplinary Rule is a public reprimand, with the next most serious punishment a one-year suspension Rule V, ¶. 6. For a second offense, a lawyer must be indefinitely suspended or permanently disbarred, depending on the seriousness of the misconduct. Rule V, ¶. 7.

on May 23, 1984, it denied his motion to stay execution of its judgment pending appeal to this Court. This appeal followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Seven years after *Bates,* lawyer advertising remains an area fraught with dangers for practitioners. On the one hand, this Court has laid down guidelines which appear to permit a wide range of advertising by lawyers, provided that the advertising is not false or misleading and does not pose special dangers to the public. On the other, many states, including Ohio, have not revised their rules governing lawyer advertising in light of this Court's decisions and continue to enforce highly restrictive prohibitions, such as the laundry list of permitted subjects contained in Ohio's DR 2-101(B). As a result, attorneys who wish to use advertising for what this Court recognized to be the important purpose of informing the public of their availability to handle legal matters are compelled to maneuver through what is at best an uncharted legal minefield, with their careers and livelihoods in jeopardy if they overstep the indeterminate boundaries.

This case is an appropriate one to resolve some of this uncertainty because it squarely presents a number of unanswered First Amendment questions:

> — May a state discipline an attorney for publishing an advertisement which describes a specific legal problem and offers the attorney's services in handling it?
>
> — May a state impose an outright ban on any advertising that contains an illustration other than the scales of justice or a picture of the attorney?
>
> — May a state force an attorney to publish detailed information relating to his fee structure if the attorney simply wishes to advertise that he accepts cases on a contingent fee basis?

Each of these questions is substantial in its own right, and until answered, lawyers who wish to provide more than the most minimal amount of information in their ads will run the substantial risk of becoming the subject of a disciplinary proceeding. More importantly, perhaps, is the fact that the American public has an even greater stake in assuring the removal of unnecessary barriers to the free flow of information from lawyers than does the Bar:

> Bates is not a decision for the benefit of the bar; it is a decision for the benefit of consumers of legal services, and it is from their viewpoint that the problem must be approached.

Durham v. Brock, 498 F. Supp. 213, 222 (M.D. Tenn. 1980).

This case also presents important questions relating to the procedures which a state must employ in the prosecution of a lawyer for improper advertising, particularly where it claims that an ad is misleading. Here, appellant was disciplined for violations with which he was never charged, and thus never had an opportunity to defend himself. This Court should make it clear that states must abide by the principles of due process—something that Ohio failed to do here—when seeking to discipline attorneys.

A. This Appeal Presents Important Questions Under the First Amendment.

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (*"Central Hudson"*), this Court set forth a four-part test to determine whether commercial speech, such as advertising, is protected by the First Amendment. The first requirements are that the statement "must concern lawful activity and not be misleading." *Id.* at 566. Next, a court must ask "whether the asserted government interest is substantial" and then "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* And, in making those determinations, the party seeking to

uphold the restriction has the burden of justifying it. *Bolger v. Youngs' Drug Products Corp.*, 103 S.Ct. 2875, 2882 n.20 (1983).

The Ohio Supreme Court reprimanded appellant for publishing his Dalkon Shield ad, finding five separate violations of its Disciplinary Rules. In turn, these five can be divided into the two categories reflected in the first two questions presented on this appeal: those involving claims of solicitation and those relating to the contents of this ad. For the reasons more fully discussed below, appellant contends that neither category of charges can be sustained under the tests established in *Central Hudson* and, perhaps more importantly, they are wholly at odds with the approaches in, if not the actual holdings of, *Bates* and *R.M.J.*

1. The Anti-Solicitation Charges (Question 1): Since the parties stipulated that the advertisement was not misleading, and appellee conceded that it dealt with lawful activity, it is necessary to determine whether the governmental interest in preventing appellant from running the ad and accepting employment from those who responded to it is substantial, whether the regulation directly advances that interest, and whether it is more extensive than necessary to achieve that end. The solicitation charges are contained in Count IX and assert, in essence, that this ad may be prohibited without regard to its content because of other policy reasons. However, as this Court noted in *Central Hudson, supra:* "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566, n.9.

The Board found a violation of DR 2-103(A) based on the fact that the ad implicitly recommended appellant's employment to the reader, and the Ohio Court approved that finding. Both the Board and the Court reached that determination without discussing the fact that the advertisement approved by this Court in *Bates* also contained the same kind of implicit recommendation. The only difference is that the Dalkon

Shield ad focused on a single type of legal matter whereas the ad in *Bates* addressed more general needs for legal services, but there is no reasoned basis for that difference to alter the outcome. Indeed, the "implicit recommendation" theory would seem to apply to virtually any ad placed by any lawyer, including that upheld in *Bates.*

Nor does the State's other solicitation charge rest on firmer ground. In many respects DR 2-104(A) is similar to DR 2-103(A) as construed by the Ohio Court, except that to violate the former provision, a lawyer must both give unsolicited legal advice and accept employment arising out of that advice. Once again, it is difficult to believe that the outcome in *Bates* would have been different if the ad had read, "the law in Arizona does not require married couples to stay married if either of them wants a divorce." Surely, that would have constituted "unsolicited legal advice," particularly if the ad also had stated that "the law firm of Bates & O'Steen is available to do the necessary legal work for you." Similarly, an ad embodying the "legal advice" that "if you don't have a will, the State will decide who gets your assets when you die," would seem functionally indistinguishable from the instant ad, but also indistinguishable from *Bates,* as would an advertisement announcing, "if you have been discriminated against in your job because of race, sex, religion or national origin, you may have a claim against your employer." See *State v. Schaffer,* 649 P.2d 355 (Okl. 1982) (upholding an ad involving "advice" regarding adoptions).

It should also be noted that this case does not involve advice sent by direct mail, targeted to an individual, or given in person. Thus, in some respects the Dalkon Shield ad, which appeared only in newspapers of general circulation in Ohio, is less potentially troubling than the individual solicitation letter upheld by this Court in *In re Primus,* 436 U.S. 412 (1978), a case not discussed by the Ohio Supreme Court and simply cited by the Board. The Board also suggested that this Court's decision in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), was "not wholly different" from the instant case

(App. 16a), despite the fact that *Ohralik,* which is the only post-*Bates* case upholding a restriction on commercial speech by lawyers, involved in-person solicitation of a recent accident victim in her hospital room.

The Ohio Court also failed to take into account that this Court's decisions overturning absolute prohibitions on commercial speech have been based on the public's need to obtain vital information about matters of concern to them. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 763-65 (1976); *Bates, supra,* 433 U.S. at 364. Thus, while protection of the public from misleading ads or overreaching tactics are substantial state interests, the prohibitions upheld below would deny the public vital information about their legal rights and the availability of a qualified lawyer who is willing to represent them, without any showing that the state's interests would be directly advanced by the prohibitions in a way no more restrictive than necessary to serve those interests. See *Central Hudson, supra,* 447 U.S. at 566.

A number of lower court decisions have upheld on First Amendment grounds efforts by lawyers to write directly to potential clients, a practice which if anything is more likely to be deserving of scrutiny than placing the Dalkon Shield ad at issue here. *See In the Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204 (Minn. 1981) (Dalkon Shield solicitation), and *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania,* 579 F. Supp. 880, 888-91 (E.D.Pa. 1984). However, as the cases cited in note 11, page 889 of *Spencer* indicate, the state courts are sharply divided on this issue.

Moreover, as this Court noted in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 n.6 (1977), "after *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental." Yet in this case appellee introduced no evidence to support the need for the restriction on the Dalkon Shield advertisement, nor did either the Board or the Court offer any reasons to justify it, but simply announced their conclusion that the ban was reasonable.

It is clear, however, that such conclusory statements will not satisfy the requirements that the governmental interests must be substantial, that the rule materially advance those interests, and that it be no more restrictive than is necessary. Indeed, restrictions no more intrusive than these were set aside in *Central Hudson, Carey v. Population Services International,* 431 U.S. 678 (1977), and *Bolger v. Youngs' Drug Products Corp., supra.* Accordingly, it is apparent that the solicitation bans upheld by the Ohio Supreme Court under DR 2-103(A) and DR 2-104(A) in this case raise substantial questions under the First Amendment which require full consideration by this Court.

2. The Content Restriction Charges (Question 2): The First Amendment questions raised by the content restrictions imposed by the Ohio Supreme Court also deserve plenary consideration by this Court. The principal basis for review is that appellee stipulated that "the Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim" (paragraph 30, stipulation of September 13, 1982), thereby raising serious doubts that DR 2-101(B), which is intended "to facilitate the process of informed selection of a lawyer . . .," can constitutionally apply in these circumstances.

First, the Board found that the drawing of a Dalkon Shield in appellant's ad was in violation of DR 2-101(B), which imposes a flat ban on any type of illustration other than a photograph of the lawyer or portrayal of the scales of justice. The Court barely discussed the question, and the Board defended this restriction merely by a general claim about the potentially misleading effects of some illustrations. Contrary to the Board's assertion (App. 14a), there was, however, no "evidence" to support even this general assertion, let alone evidence that this ad had the potential to mislead its readers. To the contrary, appellant offered substantial evidence that his inclusion of a drawing of a Dalkon Shield helped a

number of readers identify that this advertisement related to a particular kind of IUD and to recognize that they might have a legal remedy against its manufacturer. In addition, appellant's witnesses also testified to the importance of illustations in conveying a message in a way that words alone could not, and in gaining the attention of the reader in order to convey the information contained in the written portion of the advertisement.[4]

Although DR 2-101(B) states that its purpose is to aid clients to make informed choices about retaining a lawyer, the effect of an illustration ban, at least as it applies to this case, is to make it less likely that injured women will learn about their potential rights against the manufacturer of the Dalkon Shield or will secure competent counsel. While neither *Bates* nor *R.M.J.* eliminates all restrictions on lawyer advertising, the decision below does not meet the test set forth in *R.M.J.* which permits discipline to be imposed only where "the particular advertisement is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." 455 U.S. at 202. *See also In the Matter of Disciplinary Proceedings Against Marcus,* 107 Wis.2d 560, 390 N.W.2d 806, 815 (1982) (imposing a burden on the Bar of establishing by "clear and satisfactory evidence" that ads are inherently or actually misleading).

The other two violations relate to certain nondisclosures regarding appellant's contingent fee arrangements. Appellant's ad merely stated that representation in Dalkon Shield litigation would be on a contingent fee basis, but did not state either the rates to be charged or whether those undisclosed percentages would be computed before or after costs were paid. According to appellee, those omissions violated the specific requirement for inclusion of contingent

---

[4]Indeed, a picture of the scales of justice allows the very attention-getting purpose that the Dalkon Shield served here, which is presumably the same purpose that would be served by including a photograph of the lawyer, which is also permitted.

fee rate information in DR 2-101(B)(15) and the prohibitions against misleading advertisements in DR 2-101(A).

However, to sustain that broad interpretation by the Ohio Supreme Court, the state must show that a substantial state interest is served by the rule which says, in effect, that if a lawyer mentions contingent fees in an advertisement, he or she must include the percentages applicable (which may vary from case to case) and must state how costs are handled in all such cases. Appellee offered no evidence to justify such a mandatory provision, nor were any reasons offered by the Board or the Court for imposing that requirement. While the Court did mention both *Bates* and *R.M.J.*, it failed to discuss how this requirement was consistent with those decisions, or how it met the mandates of *Central Hudson*. Nor did it discuss the basis on which lawyers are permitted to advertise hourly rates and fixed fees for specific legal services under subparts 16 and 17 of DR 2-101(B), but are not required to make similar disclosures for rates in those circumstances. In short, nothing in either *Bates* or *R.M.J.* appears to support these rigid, mandatory requirements, and their validity surely presents a substantial constitutional question under the First Amendment.[5]

---

[5]The Board also found a violation of DR 2-101(A) on the ground that the advertisement stated that no legal fees would be owed if there was no recovery, which suggested to the Board that costs need not be paid either (App. 14a). Once again, there was no discussion of the constitutional standards, nor any proof that clients would not be able to distinguish between legal fees and costs. More importantly, appellee never charged that the failure to disclose the obligation to pay costs was misleading. Count VIII, ¶ 27 of the amended complaint, alleged only that "the failure to include the qualification regarding *computation* of contingent fee is a violation of DR 2-101(B)(15) and a violation of DR 2-101(A) as a deceptive statement likely to mislead the public"(emphasis added). This allegation, coupled with the allegation in ¶ 26 that there was no statement "about the method for computing such fee as required by DR 2-101(B)(15)," make it clear that appellant was charged under two different provisions for failure to include the information required by subpart 15. Thus, because he was never charged with having made a misleading statement based upon the "no legal fees" assertion being equivalent to a "no-cost" assertion, it would be a violation of due process if he were found guilty of placing a misleading advertisement on that basis. *See* Part B, *infra*.

B. Appellant's Due Process Claims as to the Drunk Driving Ad Are Substantial.

Counts II and III dealt with the drunk driving advertisement. Both proceeded on a common theory: the ad proposed a contingent fee in a criminal case, which is prohibited by DR 2-106(C). Since appellant did not enter into any such agreement, appellee acknowledged that he did not violate the substantive Rule. Appellee nonetheless argued that the ad was prohibited because it was for a transaction into which, appellee contended, appellant could not lawfully enter, and hence the ad could be prohibited as deceptive under DR 2-101(A). In addition, appellee alleged that since the arrangement was for a contingent fee, then, like the Dalkon Shield advertisement, appellant was required to include the information contained in DR 2-101(B)(15), which he did not do.

The difficulty for appellee is that neither the Board nor the Court accepted its theories. The Board found no violation of DR 2-106(C), and the Ohio Supreme Court did not even mention that provision. Instead, the Board based its ruling on an entirely new theory—that the ad was misleading because of what the Board said was the common practice of defendants pleading guilty to lesser included offenses when charged with drunk driving. Under the Board's theory, because the client would not be convicted of drunken driving, no refund would be paid, and the public would have been misled by appellant's ad. However, the theory was never urged by appellee, but was invented by the Board after the trial, after all of the evidence was in, and after counsel had submitted their post-trial briefs. Indeed, appellee recognized that this was a change in theory since in its brief to the Ohio Supreme Court, it simply agreed that the Board's finding was correct, but urged the Court to rule on the theory on which it had initiated and tried the case.

Changing theories in midstream in lawyer disciplinary proceedings has previously been condemned by this Court in *In re Ruffalo*, 390 U.S. 544 (1968). There, this Court ruled that a lawyer is "entitled to procedural due process, which includes fair notice of the charge." *Id.* at 550. It went on to observe

that the "charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused." *Id.* at 551. The Court further noted that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." Id. at 552.

A similar violation of due process was overturned by this Court in *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), where an appellate court upheld a conviction on the basis of a section not charged, rather than the one on which the case was tried:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

As the Court stated, it is "as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *DeJonge v. Oregon,* 299 U.S. 353, 362 [1937]." *Id.* See also *Morgan v. United States,* 304 U.S. 1, 18-22 (1938), and *Wolff v. McDonnell,* 418 U.S. 539, 564 (1974).

Aside from the notice violation, due process was also offended because of the total absence of any evidence in the record to support the essential factual predicate relating to the practices at the Municipal Courts. See *Thompson v. Louisville,* 362 U.S. 199 (1960). Whether due process would allow the reports of the Municipal Courts to be received in evidence to prove the practice alleged would depend on whether there is sufficient assurance of their "underlying reliability and probative value." *Richardson v. Perales,* 402 U.S. 389, 402 (1971). But to take judicial notice of the contents of those reports, and to generalize about the practice in the Municipal Courts based on them in order to make a determination of

whether an ad is misleading, without giving appellant any opportunity to respond to the actual charge of which he was found guilty, is surely a violation of fundamental due process. *See Greene v. McElroy,* 360 U.S. 474, 496 (1959) ("... where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue"). *But see Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961). Moreover, the Ohio Supreme Court's casual acceptance of the Board's expansive use of judicial notice, especially in a First Amendment context, runs counter to the emphasis in *R.M.J.* on record support for a finding that an advertisement is misleading. *See* 455 U.S. at 202, 205-07.

Accordingly, either the absence of fair notice of the charges or the failure to offer evidence to support the claim that the drunk driving ad was misleading is sufficient to overturn the Ohio Supreme Court's ruling. Taken together, they constitute a fundamental deviation from the mandates of the Due Process Clause and present a substantial question for this Court to review.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank
Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

July 2, 1984

APPENDIX A

OFFICE OF DISCIPLINARY COUNSEL v. ZAUDERER.

[Cite as Disciplinary Counsel v. Zauderer (1984), 10 Ohio St. 3d 44.]

Attorneys at law—Misconduct—Public reprimand—DR 2-101(B) permissibly restricts commercial speech and is constitutional.

O.Jur 3d Attorneys at Law § 34.

DR 2-101(B) of the code of Prosessional Responsibility permissibly restricts the content of protected commercial speech and is therefore not violative of the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

(D.D. No. 83-19—Decided April 4, 1984.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Bar.

On July 29, 1982, the Office of Disciplinary Counsel, relator herein, filed a complaint against Philip Q. Zauderer, respondent herein, alleging that respondent violated certain Disciplinary Rules of the Ohio Code of Professional Responsibility with the publication of two legal service advertisements.

The first advertisement related to respondent's availability for representation of individuals charged with driving while intoxicated. That advertisement appeared in one newspaper for a period of two days, at which time respondent voluntarily withdrew it. He accepted no employment as a consequence of that advertisement.

The second advertisement related to respondent's avail-

ability for representation of women in connection with injuries resulting from the use of a particular intrauterine [sic] birth control device known as the "Dalkon Shield." This advertisement, which was the subject of six of the nine counts of the relator's complaint as later amended, contained various types of information, including: (1) a diagram of the Dalkon Shield; (2) statements that the Dalkon Shield has been alleged to have caused serious injuries to its users; (3) a statement that it may not be too late to take legal action against the Dalkon Shield's manufacturer; (4) the statement that the respondent's firm is representing women who have sustained such injuries; and (5) statements that the respondent's fees for such representation are payable on a contingency basis.[1] The Dalkon Shield advertisement did not state the percentage of the respondent's contingent fee rates nor did it describe potential litigation-related costs.

On May 24, 1983, a hearing was held on these matters before a three-member panel of the Board of Commissioners on Grievances and Discipline (hereinafter "board"), at which time a substantial amount of evidence was introduced respecting the value of advertising to the public, and the unique value of respondent's Dalkon Shield advertisement in light of the public's limited awareness of the dangers of that particular device. As a result of that hearing, the panel recommended that respondent receive a public reprimand.

[1]The Dalkon Shield advertisement at issue contained an illustration of the device itself and copy which read as follows:

"Did you use this I.U.D.? The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients. For free information call 1-614-444-1113. The law firm of Philip Q. Zauderer & Associates, 52 West Whittier Street, Columbus, Ohio 43206."

The board declined to adopt the panel's recommendation, however, and recommended instead that respondent be indefinitely suspended from the practice of law. This disciplinary measure was based upon the board's findings that: (1) use of the Dalkon Shield diagram violated the prohibition of DR 2-101(B) against illustrations; (2) the Dalkon Shield advertisement contained an implicit self-recommendation of employment and respondent, through such advertisement, gave unsolicited legal advice and, therefore, his acceptance of employment violated DR 2-104(A); (3) the failure to include specific information relating to potential litigation-related costs rendered the Dalkon Shield advertisement misleading in violation of DR 2-101(A); (4) the failure to state specific fee rates in the Dalkon Shield advertisement constituted a violation of DR 2-101(B)(15); and (5) in recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer, respondent violated DR 2-103(A). The board specifically rejected respondent's assertions that the Disciplinary Rules, as applied to the Dalkon Shield advertisement, are violative of the constitutional guarantees of free speech.

As to the drunk driving advertisement, the board found that respondent violated DR 2-101(A).

The American Civil Liberties Union Foundation of Ohio, Inc., the Dispatch Printing Company, and the Ohio Newspaper Association have filed *amicus curiae* briefs urging this court to strike as constitutionally infirm the Disciplinary Rules in question.

Mr. Angelo J. Gagliardo, disciplinary counsel, and *Mr. Mark H. Aultman,* for relator.

Mr. David K. Frank, for respondent.

Messrs. Gingher & Christensen, Mr. Paul R. Gingher, Mr. Daniel G. Hale and *Mr. Malcolm L. Miller,* for *amicus curiae,* Ohio Newspaper Association.

Messrs. Jones, Day, Reavis & Pogue, Mr. John W. Zeiger and *Mr. Todd S. Swatsler,* for *amicus curiae,* Dispatch Printing Company.

Messrs. Porter, Wright, Morris & Arthur and *Ms. Lita C. Miller,* for *amicus curiae,* American Civil LIberties Union Foundation of Ohio, Inc.

CLIFFORD F. BROWN, J. This is a case of first impression in Ohio concerning the constitutional validity of Disciplinary Rules which restrict the content of legal service advertisements. Specifically, the question presented herein is whether the content restrictions of DR 2-101(B)[2] violate the

[2]DR 2-101(B) reads as follows:

"In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

"(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

"(2) One or more fields in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

"(3) Age;

"(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

"(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

"(6) Public or quasi-public offices;

"(7) Military service;

"(8) Published legal authorships;

"(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

"(10) Foreign language ability;

"(11) Whether credit cards or other credit arrangements are accepted;

[contd.]

First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

As to the Dalkon Shield advertisement we agree with the findings of the panel and board that respondent violated DR 2-101(B), prohibiting illustrations in an advertisement; DR 2-104(A), in accepting employment resulting from unsolicited advice given by him to a non-lawyer; DR 2-101(A), in publishing communications which were misleading; DR 2-101(B)(15), by failing fully to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement; and DR 2-103(A), in recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer.

These sections which the panel and board found had been violated by the respondent are constitutional provisions of the Ohio Disciplinary Rules as contained within the Code of Professional Responsibility.

[footnote 2, contd.]

"(12) Office and telephone answering service hours;

"(13) Fee for an initial consultation;

"(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

"(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

"(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

"(17) Fixed fees for specific legal services;

"(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

"(19) Memberships and offices in legal fraternities and legal societies;

"(20) In law directories and law lists only, names and addresses of references, and, with their written consent names of clients regularly represented."

The holdings of the United States Supreme Court in *Bates v. State Bar of Arizona* (1977), 433 U.S. 350, and *In re R.M.J.* (1982), 455 U.S. 191, do not totally prohibit the states from restricting lawyer advertising. The court in *Bates,* at 383-384, stated that there could well be a number of areas where restrictions are allowed. Certainly one such area is where the advertising is misleading *per se,* or may be misleading in its reach and interpretation. A potential client peering at a lawyer advertisement may be misled or confused by the expressed words, by an illustration or drawing, or by a combination of both.

In the subsequent case of *In re R.M.J.,* the court at page 203 recognized that the state retains some authority to regulate a communication which is not misleading in nature. The state must, however, assert a substantial interest in the regulation and the restriction on the advertisement must be in proportion to the interest served.

Although the restrictions must be narrowly drawn, this state's Disciplinary Rule concerning lawyer advertising passes constitutional muster. Each restriction is closely related to a substantial state interest. It is our view that an allowable restriction for lawyer advertising is that of asserted expertise of the advertising lawyer. A lawyer should not be permitted to hold himself out as an expert in certain designated areas unless there are in existence certain standards or criteria that have been promulgated by the court and set forth in the Disciplinary Rules.

Also, requirements relative to the content of the advertising concerning legal fees would be permissible under the United States Supreme Court rulings cited. Certainly for purposes of clarity to those reading a lawyer advertisement which refers to contingent fees, the requirement should be that such fees be specifically expressed, as well as any additional costs that might be assessed the client.

Also, it is reasonable for a state to impose restrictions upon lawyer advertising, prohibiting the lawyer from giving legal advice in a specific area, and then recommending employment of himself to those who have not sought his advice. Further, in this regard, the states may restrict the lawyer from accepting employment resulting from unsolicited advice given by him.

The specific subsections of DR 2-101(B) which were involved here and which were the basis of the sanctions recommended for the respondent are not unconstitutional. Although some other portions of DR 2-101(B) may be found to be constitutionally overbroad it is not necessary that we scrap the totality of this Disciplinary Rule.

With respect to the drink driving advertisement, the board found that respondent violated DR 2-101(A). The board reasoned that the phrase "Full legal fee refunded if convicted of Drunk Driving," as contained in the ad, encouraged the reader to believe that he could obtain representation in a criminal case at no cost. However, in view of the common practice of entertaining a plea of guilty or no contest to a lesser included offense when a person is charged with operating a motor vehicle while intoxicated, this interpretation would be erroneous. If such a plea were entered, the defendant would not be "convicted of drunk driving" and therefore the legal fee would not be refundable.

While we agree with the board's conclusion that the drunk driving advertisement was "misleading and deceptive" in violation of DR 2-101(A), we also note that respondent voluntarily withdrew the advertisement from circulation after only one publication and did not accept any clients as a result thereof.

Accordingly, we accept the hearing panel's recommendation and hereby determine that respondent's conduct warrants a public reprimand.

Judgment accordingly.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHNER, HOLMES and J.P. CELEBREZZE, JJ., concur.

APPENDIX B

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re Complaint Against	)	
	)	**No. 454**
Philip Q. Zauderer,	)	**Findings of Fact and Recommendation of**
Respondent	)	**the Board of Commissioners on**
Office of Disciplinary Counsel,	)	**Grievances and Discipline of The**
Relator.	)	**Supreme Court of Ohio**

• • •

FINDINGS OF FACT

This matter, a complaint against Philip Q. Zauderer, respondent, came on to private hearing on May 24, 1983 in Columbus, Ohio at the Lobby Hearing Room, State Office Tower. Present at the hearing were Philip Q. Zauderer, Respondent, his counsel, David K. Frank, Kathryn Haller, Assistant Disciplinary Counsel, and Angelo J. Gagliardo, Disciplinary Counsel, representing the Relator.

The hearing was held before commissioners Robert W. lakemore, Erwin L. Clemens and Robert B. Gosline.

The Relator presented joint stipulation exhibits Nos. l, 2 and 3, stipulations of fact previously filed in this proceeding on September l3, l982 November 23, l982, and May 24, l983. Relator presented Exhibits A, B and C, which include copies of the advertisements under consideration. Relator also called the Respondent for cross-examination and presented exhibits in connection with that testimony.

Respondent presented nine witnesses, including four expert witnesses qualified in the areas of communication, news media, advertising, constitutionality of lawyer advertising, and Supreme Court rules on lawyer advertising in Pennsylvania and throughout the United States, a fact witnesses testifying with respect to Ohio Bar Association institutional advertising, two persons who had responded to Zauderer's advertising and later became clients, and one character witness. With these witnesses Respondent offered 41 exhibits. All evidence is relevant to the Findings of Fact and will be so considered together with other pleadings, including Respondent's answers to interrogatories.

The Amended Complaint is based on two different advertisements placed by Respondent in newspapers of general circulation, the first advertisement appeared in a Columbus newspaper, and the second advertisement was published in newspapers throughout the State of Ohio.

Counts II and III allege violations of DR 2-l0l(B)(l5) and DR 2-l0l(A) in advertising a contingent fee in drunk driving criminal cases under conditions which are not permitted by the Code of Professional Responsibility and by reason of those conditions, the advertisement is alleged to be misleading. This ad, Exhibit A to the Complaint, offers "Full legal fee refunded if convicted of DRUNK DRIVING."

Counts IV through IX of the Complaint allege violations of DR 2-l0l(A) and (B) in publishing a legal service advertisement addressed to women who may have suffered personal injury from using the Dalkon Shield Interuterine Device suggesting the possibility of legal action against the Shield's manufacturer and stating that Respondent's law firm represents women on such cases and suggesting that any reader call Respondent's law firm "for free information." Exhibit B.

Count V alleges a violation of DR 2-l0l(B) in that the advertisement includes a drawing, illustration, of the Dalkon Shield.

Count VI alleges a violation of the same section because the advertisement is not presented in "a dignified manner."

Count VII alleges a violation of governing Rule V and Respondent's oath of office as a lawyer.

Count VIII alleges a violation of DR 2-101(B)(15), because it does not disclose whether percentages are computed before or after deduction of court costs and expenses. It also asserts a violation of DR 2-101(A) in that this failure to disclose constitutes a deceptive statement.

Count IX alleges that the advertisement provided unsolicited legal advice, recommended Respondent for employment, and Respondent accepted employment in violation of DR 2-103(A) which prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer and DR 2-104(A) which prohibits an attorney from accepting employment after giving unsolicited advice to an individual that he obtain counsel or take legal action.

With respects to Counts II and III, Respondent denies violation of the DR's.

In response to Counts IV through IX, Respondent's answer admits that the challenged advertisement was published in a newspaper on March 11, 1982 and that the content of that advertisement "may, in part, technically violate DR 2-101(B)" and that the illustration in the advertisement "may technically violate" DR 2-101(B).

The answer alleges that Exhibit B, was published only after the United States Supreme Court decision in the case of *In re R.M.J.*, 455 U.S. 191 (Jan. 25, 1982) and after a conference on March 5, 1982 with Disciplinary Counsel.

The answer denies the other operative allegations of Counts V through IX concerning the nature, intent and form of the advertisement Exhibit B.

The answer asserts 22 affirmative defenses based on the First, Ninth and Fourteenth Amendments to the United States Constitution and Sections 1, 11 and 20 of the Ohio Constitution; the "public's rights" guaranteed by the same United States Constitutional amendments and the same articles and sections of the Ohio Constitution; estoppel from prosecution

by reasons of the conference with Disciplinary Counsel after *In re R.M.J., supra;* and other defenses directed to the Disciplinary Rules.[1]

Other defenses state denial and disagreement with the Relator's construction and application of the Disciplinary Rules and of the advertisement.

STATEMENT OF THE FACTS

The Respondent, Philip Q. Zauderer was admitted to practice law in Ohio in October 17, 1964. His office is located on Whittier Square, 52 W. Whittier Street, Columbus, Ohio 43206. Copies of the advertisements, Exhibits A and B, are attached to this report.

The Drunk Driving Advertisement. This advertisement, Exhibit A, was published one time only. Respondent did not accept any clients on the basis stated in the advertisement and it was immediately withdrawn. Subsequently, he sent a letter to Office of Disciplinary Counsel acknowledging that it was a violation of the Disciplinary Rule "prohibiting contingency fees in criminal cases" and giving assurance that he would not make "any such mistakes in the future."

It is general knowledge which can be determined from Municipal Court reports to the Supreme Court that, in disposing of driving while intoxicated (OMVI) charges, in many cases, the charge is reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court. In that manner, the defendant would not be "convicted of drunk driving," and the legal fee would not be refundable. This advertisement was misleading and deceptive in violation of DR 101-(A).

Because DR 2-106(C) provides only that "a lawyer shall not enter into an arrangement for, charge or collect a con-

[1]Respondent's Ninth Defense quotes Governing Rule V, Section (4), after investigation "a decision as to disposition of such complaint shall be made within 30 days thereafter," following the authority of the decision in *Kves v. Penn Rd. Co.* (1952), 158 Ohio St. 362, order was entered dismissing this defense on the ground that 30-day limitation is "directory and not mandatory" and failure to comply does not deprive the court of jurisdiction.

tingent fee" in a criminal case, the advertisement itself does not violate that section.

The Dalkon Shield Advertisement. This is Exhibit B to the Complaint. It contains an illustration of a Dalkon Shield I.U.D. In text, it states that this is alleged to cause various injuries. It includes the statement, 'Do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients. For free information call [telephone number of Respondent]." At the bottom is "The Law Firm of Philip Q. Zauderer & Associates" with its address.

Prior to November, 1981, and in the period of time from May 26, 1981 through August 18, 1981, Respondent and Disciplinary Counsel discussed newspaper advertisements proposed to be run by Respondent. These discussions included the Dalkon Shield advertisement which had been used by Minnesota attorneys, Appert and Pyle. That contained an illustration of the I.U.D. and a verbal text very similar to Exhibit B. Prior to October, 1981, Disciplinary Counsel advised Respondent that the Appert and Pyle advertisement did not comply with Ohio DR 2-101(B).

On December 17, 1981, the Supreme Court of Minnesota decided the case of *In re Appert and Pyle*, 315 N.W.2d 204 (Minnesota, 1981). The Dalkon Shield advertisement was one subject of that suit. The Court held that the Minnesota Disciplinary Rule which had the effect of prohibiting attorneys from such advertising was an unconstitutional restriction on the attorneys' and the publics' First Amendment right of free speech.

On January 25, 1982, the United States Supreme Court issued its decision *In re R.M.J.*, 455 U.S. 191 (1982). That case involved a disciplinary rule of the Missouri Supreme Court relating to advertising by lawyers. By that rule, a lawyer advertising was limited to ten categories of information. The court held that "in the circumstances of this case" the restrictions of the Missouri rule could not be sustained. The court emphasized that the states retained the authority to regulate advertising that is misleading. 455 U.S. at 200.

On March 5, 1982, respondent met with Disciplinary Counsel and, as a proposed advertisement, showed him a copy of what is Exhibit B. After discussion, "it was recognized by both the Respondent and [Disciplinary Counsel] that the Dalkon Shield advertisement did not conform to Ohio DR 2-101(B)." "It was agreed that there were items in DR 2-101 that the [U.S. Supreme] court in *R.M.J.* did not discuss." "[Disciplinary Counsel] did not advise Respondent that he should or should not publish the advertisement." Thereafter, Respondent took it upon himself to conclude that Disciplinary Counsel "would be bound to follow the ruling of the *R.M.J.* case," apparently claiming to himself that the ad would be constitutionally protected. Tr 197-98. Stipulation filed September 13, 1982, ¶¶ 24 through 27.

After March 8, 1982, Respondent placed the Dalkon Shield advertisement for publication in 36 newspapers of general circulation throughout Ohio, from the Akron Beacon Journal to the Zanesville Times Recorder. Stipulation filed September 13, 1982, ¶¶ 28 and 29 and stipulation filed November 23, 1982, ¶ 1. The total combined daily circulation of these newspapers was stipulated to be 1,180,160. Stipulation filed September 13, 1982, ¶ 29 and stipulation filed November 23, 1982, ¶ 2.

Two hundred thirty-five persons communicated with Respondent as a result of these advertisements. One hundred six of them retained him as attorney, and he accepted such employment. For each of them, he has filed a lawsuit in the United States District Court for the Southern District of Ohio. Respondent's answers to Relator's First Interrogatories, pages 3-24.

Recommendation of Employment for Himself. The advertisement, Exhibit B implicity recommended that readers of the advertisement employ him or an associate before any reader had sought his advice regarding employment of a lawyer. This

was in accord with his expressed interest to make the public aware that he was available to act as an attorney-at-law in this kind of cases. Tr. 29. The number of interviews and of professional engagements which resulted confirm the self-recommendation clearly inferred by it. This was a violation of DR 2-102(A), "A lawyer shall not recommend employment *** of himself."

Contingent Fee. The advertisement, Exhibit B, recites "the cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." A representative contingent fee contract, states contingent fee rates of 33.33 per cent to 45 per cent if an appeal is necessary. If Respondent is discharged, he would be entitled to a reasonable value fee. The client will be liable for out-of-pocket costs "court costs, long distance telephone charges, court costs, document duplication costs, brief printing cost, postage, court reporter's fees, medical report expenses, witness fees, costs of obtaining evidence, necessary disbursements and reasonable travel expenses." Client must reimburse Respondent for those expenses, which can be very substantial.

In failing to disclose this information, the advertisement left standing the impression that if there were no recovery, the client would owe nothing. In this, the advertisement is misleading, in violation of DR 2-101(A) and in failing to include the contingent fee rates as called for by DR 2-101(B)(15).

Illustration In Advertisement. The advertisement, Exhibit B, displays a "drawing, illustration" in violation of DR 2-101(B). The prohibition and the violation are both clear.

Illustrations in advertising are an integral part of the advertisement. Tr. 65. They are attention-getters (Tr. 76) even though they may only collaterally relate to the advertisement. Respondent's Exhibits 17-20. Advertising agencies look upon this function of illustrations as appropriate. Tr. 76. And these illustrations are to help induce or persuade people to take action. Tr. 78.

The evidence and general knowledge with respect to newspaper, magazine, and television advertising make it clear that

the use of illustrations can be the cause of misunderstanding, misleading interpretation of an advertisement, distraction from reading or understanding the significant messages of the verbal portion of an advertisement and in general, color the reaction of the viewer to the advertisement. It is not unreasonable to restrict lawyer advertising to the single illustration which universally represents law and justice. As is done in DR 2-101(B). The same would be true with respect to "animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures."

The use of an illustration in the advertisement, Exhibit B, is a violation of DR 2-101(B).

Accepting Employment After Unsolicited Legal Advice. The advertisement, Exhibit B, did offer legal advice to all persons who responded to it. "Do not assume it is too late to take legal action against the Shield's manufacturer." Subsequently, Respondent accepted employment by 106 persons who counseled with him as a result of the advertisement. The DR 2-104(A) prohibition against such employment is specific and does not involve any right of communication or speech.

Respondent's conduct in this regard constitutes a violation of DR 2-104(A).

Estoppel. Respondent's consultations with Disciplinary Counsel do not create any estoppel to prosecuting these charges.

Respondent, in effect, concedes violation of DR 2-101 by publishing these advertisements, Exhibits A and B. Joint Exhibit 1, ¶ 24, Tr. 119. His thinking on publishing these advertisements and his principal defense to the Complaint is that the Ohio Supreme Court Disciplinary Rule on lawyer advertising is unconstitutional. Although it is not clear that this issue is for determination by the Panel or the Commission, *In re Ohralik* (1976), 48 Ohio St.2d 217, affm'd. 436 U.S. 447 (1978), the Board of Commissioners considered and "rejected" the defense of constitutionality and the Ohio Supreme Court adopted and "reiterated" this determination, the Panel submits its recommendation on this issue in the following paragraphs.

Constitutionality. Respondent has pleaded the defense that Ohio Supreme Court DR 2-l0l is unconstitutional in that, basically, it violates the United States Constitution, First and Fourteenth Amendments. He relies on *Bates v. State Bar of Arizona,* 433 U.S. 349 (1977) and *In re R.M.J.,* 455 U.S. 191 *(1982) and* distinguishes the case of *Ohio State Bar Association v. Ohralik, supra.*

Bates v. State Bar of Arizona, supra, considered lawyer advertising in terms of "commercial speech" and held that it was "entitled to some First Amendment protection." The court held that advertising routine legal services and the fixed rates at which they would be furnished was protected commercial speech and constitutionally protected by the First Amendment.

In re R.M.J., supra, held that the restrictions on lawyer advertising imposed by Missouri Supreme Court Rule 4 could not be sustained under the circumstances of that case. Those provisions were more restrictive than Ohio DR 2-l0l. However, neither of these decisions held that all restrictions on lawyer advertising are unconstitutional.

Ohralik, supra, considered a fact situation involving in-person solicitation of legal representation while the anticipated client was confined to the hospital after having been injured in an automobile accident. The in-person solicitation of employment by conference in Respondent's office, though voluntarily undertaken by the anticipated clients, is not wholly different from the *Ohralik* situation when the inequalities of the lawyer-client conference are considered. Also, the *Ohralik* opinion furnishes numerous general guides concerning the extent of First Amendment protection of commercial speech, that is, some protection, not complete protection.

> ***we instead have afforded commercial speech a limited measure of protection commensurate with its *subordinate* position in the scale of First Amendment values. 436 U.S. at 456. (Emphasis added)

* * *

* * * the *State does not lose* its power to regulate commercial activity *deemed harmful* to the public whenever speech is a component of that activity. 436 U.S. at 456.
(Emphasis added)

* * *

In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates.* 436 U.S. at 457

* * *

DR 2-l04(A) merely prohibited him from using the information as bait with which to obtain an agreement to represent them for a fee. The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice. 436 U.S. at 458

* * *

A lawyer's procurement of remunerative. employment is a subject *only marginally affected with First Amendment* concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests. 436 U.S. at 459. (Emphasis added)

* * *

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation

are prophylactic measures whose objective is the *prevention of harm before it occurs.* The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the *State has a strong interest* in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

* * *

The State's perception of the potential for harm in circumstances such as those presented in this case is well founded. The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. 436 U.S. at 464-65 (Emphasis added)

* * *

We hold that the application of *DR 2-103(A)* and *2-104(A)* to appellant does not offend the Constitution. 436 U.S. at 468. (Emphasis added)

See also, In re Primus, 436 U.S. 412 (1978); cf. *Lehman v. Shaker Heights* (1973), 34 Ohio St.2d 143, affm'd. 418 U.S. 298 (1974). (*Prohibition* of commercial speech by political advertising on public transit vehicles involved "no First or Fourteenth Amendment violation." 418 U.S. at 304.)

Under the facts of this case, the application of DR 2-101(A), DR 2-101(B)(15), DR 2-103(A), and DR 2-104(A) to Respondent does not offend the United States Constitution.

Conclusion. The panel find that by reason of the placement and publication of the advertisements, Exhibit A and B, and subsequent conduct directly related to those advertisements and his acceptance of employment, Respondent violated DR 2-101(A) in publishing public communications which were misleading, DR 2-101(B) by using a drawing, illustration in the advertisement, Exhibit B, DR 2-101(B)(15) by failing fully to disclose the terms of the contingent fee agreement which was intended to be entered into at the time of publishing the advertisement, Exhibit B, DR 2-103(A) in recommending employment of himself as a private practitioner to a non-lawyer who has not sought his advice regarding employment of a lawyer, and DR 2-104(A) in accepting employment resulting from unsolicited advice given by him to a non-lawyer.

RECOMMENDATION

The Relator expressed the opinion that one year suspension should be imposed as discipline. The Respondent, by counsel, stated that a public reprimand should be the maximum discipline considered.

Although Respondent placed the advertisements knowing that they were probably violative of Disciplinary Rules, it was discussed with the then Disciplinary Counsel in advance. There was no evidence of client dissatisfaction at or before the date of the hearing.

The Panel recommend that a public reprimand be administered to the Respondent.

Pursuant to Gov. R. V, the Board, on June 24, 1983, adopted the Findings of Fact and Conclusions of Law of the Panel and recommends an indefinite suspension from the practice of law.

/s/ Louis C. Damiani
Secretary, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

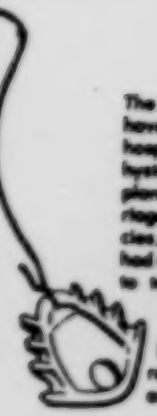
Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

EXHIBIT "A"

DID YOU USE THIS IUD?



The Dalkon Shield Intrauterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates
52 West Whittier Street
Columbus, Ohio 43206

EXHIBIT "B"

APPENDIX C

The Supreme Court of Ohio
Columbus

Office of Disciplinary Counsel,	:	ON CERTIFIED REPORT BY THE
Relator,	:	BOARD OF COMMISIONERS ON
-vs-	:	GRIEVANCES AND DISCIPLINE
Philip Q. Zauderer,	:	
	:	DD No. 83-19
Respondent.	:	
	:	ORDER

It appearing to the Court that, Louis C. Damiani, Secretary to the Board of Commissioners on Grievances and Discipline of the Bar, filed the Board's Final Report in this Court on July 20, 1983, recommending that the respondent, Philip Q. Zauderer be publicly reprimanded pursuant to Section 6(d) of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio; and it further appearing that respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this case was argued before the Court on December 6, 1983. On consideration thereof, it is ordered and adjudged by the Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and same hereby is, confirmed for the reasons set forth in the opinion rendered herein and this entry shall constitute the public reprimand provided, however, that should the respondent, Philip Q. Zauderer, be found guilty of subsequent misconduct, he shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

It is further ordered that the respondent, Philip Q. Zauderer, pay the costs of these proceedings taxed in the

amount of one thousand forty three dollars and sixty-three cents ($1,043.63) on or before May 4, 1984.

It is further ordered that the Clerk of this Court issue certified copies of this order as provided for in Section 20 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

APPROVED: /s/Frank D. Celebrezze

FRANK D. CELEBREZZE, Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from Journal 60.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 4th day of April, 1984.

JAMES WM. KELLY
CLERK
/s/ Joseph N. Rosenthal
DEPUTY

APPENDIX D

IN THE SUPREME COURT OF OHIO

Office of Disciplinary Counsel, Relator,	:	
—vs-	:	1983 Term
Philip Q. Zauderer	:	Case No. DD 83-19
Respondent.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, that the above-named Respondent, Philip Q. Zauderer, hereby appeals to the Supreme Court of the United States from the judgment and final order of the Supreme Court of Ohio, entered and issued in this disciplinary proceeding on April 4, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ David K. Frank
DAVID K. FRANK
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Counsel for Respondent-
Appellant Philip Q. Zauderer

FILED
May 31, 1984
SUPREME COURT OF OHIO
James Wm. Kelly, Clerk

PROOF OF SERVICE

I, David K. Frank, attorney for Philip Q. Zauderer, Respondent-Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that all parties required to be served pursuant to Rule 28 of the Rules of the Supreme Court of the United States have been served, and that specifically, on May 31, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court Of The United States as follows:

1. Upon the Office of Disciplinary Counsel, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Angelo J. Gagliardo, Esq. and Mark H. Aultman, Esq., OFFICE OF DISCIPLINARY COUNSEL, 175 South Third Street, Columbus, Ohio 43215, attorneys of record for Relator-Appellee, Office of Disciplinary Counsel;
2. Upon all *amicus curiae* below by mailing a copy, in a duly addressed envelope, with first class postage prepaid to:

John W. Zeiger
Todd S. Swatsler
JONES, DAY, REAVIS & POGUE
50 West Broad St., Suite 400
Columbis, Ohio 43215
COUNSEL FOR *AMICUS CURIAE*

THE DISPATCH PRINTING COMPANY

Lita C. Miller
SCHWARTZ, SHAPIRO, KELM & WARREN
250 East Broad Street
Columbus, Ohio 43215

COUNSEL FOR *AMICUS CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION
OF THE OHIO FOUNDATION, INC.

Paul R. Gingher
Daniel G. Hale
Malcolm L. Miller
GINGHER & CHRISTENSEN
311 East Broad Street
Columbus, Ohio 43215

COUNSEL FOR *AMICUS CURIAE*
THE OHIO NEWSPAPER ASSOCIATION

3. Upon the Honorable Anthony J. Celebrezze, Jr., Attorney General of Ohio, by mailing a copy to him in a duly addressed envelope, with first class postage prepaid, at his office at 30 East Broad Street, Columbus, Ohio 43215, since 28 U.S.C. § 2403(b) may be applicable.

/s/ David K. Frank

DAVID K. FRANK
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Counsel for Respondent-
Appellant Philip Q. Zauderer

APPENDIX E

OHIO DISCIPLINARY RULES

DR 2-101 PUBLICITY.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

DR 2-103 RECOMMENDATION OF PROFESSIONAL EMPLOYMENT.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a

non-lawyer who has not sought his adide regarding employment of a lawyer.

DR 2-104 SUGGESTION OF NEED OF LEGAL SERVICES.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Office - Supreme Court, U.S.
FILED
AUG 1 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHILIP Q. ZAUDERER
Appellant,

vs

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee,

On Appeal from the Supreme Court of Ohio

BRIEF IN OPPOSITION TO APPELLATE JURISDICTION, OR IN ALTERNATIVE, TO PETITION FOR CERTIORARI

ANGELO J. GAGLIARDO
Disciplinary Counsel for the
Supreme Court of Ohio
COUNSEL OF RECORD

MARK H. AULTMAN
Office of Disciplinary Counsel
Staff Counsel

Office of Disciplinary Counsel
175 S. Third St., Suite 280
Columbus, Ohio 43215
(614) 461-0256

COUNSEL FOR APPELLEE

QUESTIONS PRESENTED*

1. May a state, in order to further its substantial state interest in regulating the legal profession and protecting the public, prohibit an attorney from running a newspaper advertisement, irregardless of the accuracy of the statements made therein, which conveys information concerning a particular product alleged to be defective, including medical information concerning which the lawyer may have no expertise, and which solicits person who may have used the particular product to be represented by the attorney?

2. May a state, in order to further its substantial state interest in regulating the legal profession, and to protect members of the public who are not familiar with contingent fee agreements, (a) prohibit the advertising to the public of offers to represent persons on a contingent fee basis, where the public is not informed of the likely costs and other limitations of the contingent fee agreement, and (b) prohibit as misleading the advertisement of contingent fees in criminal cases where attorneys are not permitted to charge contingent fees in such cases?

3. May a Federal Court, consistent with the Tenth Amendment to the United States Constitution and with considerations of comity, require that a state, in a judicial proceeding of that state, require that a state give notice of a charged violation other then the facts constituting the violation and the rule violated thereby, or prohibit a state Supreme Court from taking action based upon judicial notice of matters commonly occurring in its courts of inferior jurisdiction?

*There are no parties to this proceeding other than those listed in the caption.

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
JURISDICTION OF THIS COURT		1
STATEMENT OF THE CASE		3
ARGUMENT		5
A.	A Substantial State Interest Justifies Content Restrictions on Attorney Advertising	6
B.	The Communication of Information Concerning Contingent Fees	9
C.	The Use of Illustrations	10
D.	The Due Process Argument	10
CONCLUSION		13
CERTIFICATE OF SERVICE		15
Appendix A	Ohio Constitution Article IV Sec. 2	A-1
Appendix B	Rules for the Government of the Bar of Ohio, Rule V	A-3
Appendix C	Rules for the Government of the Bar of Ohio, Rule VI	A-28
Appendix D	Ohio Rules of Evidence, Rule 201 (B)	A-30

TABLE OF AUTHORITIES

Cases:

	Page
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	5, 6, 13
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)	6
Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980)	11
In The Matter of Felmeister, 471 A. 2d 775 (N.J., 1984)	11
In Re Primus, 436 U.S. 412 (1978)	6
In Re RMJ, 455 U.S. 191 (1982)	5, 13
In Re Ruffalo, 390 U.S. 544 (1968)	11
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)	6
Lathrop v. Donohue, 367 U.S. 820 (1961)	2
Mackay v. Nesbitt, 412 F 2d. 846 (1969)	1
Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), at P. 731	5

Constitutional Provisions, Statutes, and Rules:

United States Constitution

Tenth Amendment i

28 U.S.C. 1257 (2) 1, 5
28 U.S.C. 1257 (3) 1

Ohio Constitution

Article IV, Sec. 2 ..... 2, 3

Disciplinary Rules of the Code of Professional Responsibility

DR 2-101 (A) & (B) 2, 3, 4, 7, 11
DR 2-101 (B) (15) 5, 11
DR 2-103 (A) 5, 7, 11
DR 2-104 (A) 5, 7, 11

Rules for the Government of the Bar of Ohio

Gov. Bar Rule V 3
Gov. Bar Rule V (2) 3
Gov. Bar Rule VI 4

Ohio Rules of Evidence

Rule 201 (B) 12

No. 83-2166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHILIP Q. ZAUDERER
Appellant,

vs

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee,

JURISDICTION OF THIS COURT

This Court does not have appellate jurisdiction under 28 U.S.C. 1257 (2) and should reject the petition for certiorari under 28 U.S.C. 1257 (3).

In *Mackay v. Nesbitt,* 412 F 2d 846 (1969), the U.S. Court of Appeals for the Ninth Circuit stated that orders of a state court related to discipline and similar matters concerning members of its bar may be reviewed only by the U.S. Supreme Court on certiorari.

The rules sought to be reviewed are not "statutes" within the meaning of 28 U.S.C. 1257 (2). The disciplinary rules of the Code of Professional Responsibility are not statutes (nor are they a part of the Rules for the Government of the Bar of Ohio as stated by Appellant), but rather are rules adopted by the Ohio Supreme Court as part of its inherent and constitutional authority to discipline attorneys (Ohio

Constitution; Article IV, Sec. 2), and promulgated through its official reports. See for example, as to DR 2-101 (A) and (B), 23 Ohio St. 2d 1; 44 Ohio St. 2d; p. xxi; 52 Ohio St. 2d p. xxix; 57 Ohio St. 2d p. xxi; and 59 Ohio St. 2d p. xix.

This case is distinguishable from *Lathrop v. Donohue,* 367 U.S. 820 (1961), in that Ohio has no intergrated bar, and any rules promulgated for the regulation of the bar are adopted by the judiciary alone pursuant to its constitutional authority under Ohio Constitution; Article IV, Sec. 2.

This Court should not exercise it certiorari jurisdiction because there is no substantial federal question which outweighs the substantial interest of the State of Ohio in regulating the attorneys who are admitted to the practice of law in its courts.

STATEMENT OF THE CASE

Appellant's statement of facts is substantially accurate, though in many instances irrelevant.

The Supreme Court of the State of Ohio has original and exclusive jurisdiction over "(a)dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Ohio Constitution, Article IV, (2) (g).

The Ohio Supreme Court has, pursuant to its authority, adopted Rules for the Government of the Bar of Ohio. Rule V of those Rules sets forth disciplinary procedure, and provides for a system of concurrent jurisdiction between certified local bar associations and Disciplinary Counsel for the filing of all complaints alleging professional misconduct, with exception of complaints alleging violations of DR 2-101 and DR 2-102 (A) and (B). Disciplinary Counsel has sole jurisdiction as to violations of DR 2-101 and DR 2-102 (A) and (B).

The Code of Professional Responsibility was originally adopted, without the Preface to the Code, by the Ohio Supreme Court, effective October 5, 1970, 23 Ohio St. 2d 1. The Preface to the Code of Professional Responsibility was adopted by the Supreme Court of Ohio effective July 15, 1974, 38 Ohio St. 2d p. xxv. The Preface states, *inter alia:*

> "The Disciplinary Rules, unlike the Ethical Constitutions, are mandatory in character. The Disciplinary Rules state the minimum level conduct below which no lawyer can fall without being subject to disciplinary action."

The Board of Commissioners on Grievances and Discipline of the State of Ohio has, pursuant to Gov. Bar Rule V (2), jurisdiction to "receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to" the Ohio Supreme Court concerning

attorney misconduct. The Board is composed of seventeen attorneys who are only nominally compensated for services provided on behalf of the Board. Certified local bar associations, or their members, with trivial exceptions, receive no compensation for services performed in investigating or prosecuting complaints. The expenses of the Office of Disciplinary Counsel, and other expenses incurred by the Board of Commissioners in investigating, hearing, and reporting matters to the Ohio Supreme Court, are funded by registration fees required to be paid by attorneys, who must register and pay the fees in order to be permitted to practice law in Ohio (Gov. Bar Rule VI).

The Rules for the Government of the Bar of Ohio provide for a hearing on disciplinary complaints before a hearing panel consisting of three (3) members of the Board of Commissioners, a report to, and review by, the Board if misconduct is found, and a certified report to the Ohio Supreme Court if the Board finds misconduct. Disciplinary action may only be taken by order of the Ohio Supreme Court.

Respondent placed the advertisements contained on pages five (5) and six (6) of his jurisdictional statement. It is uncontroverted that the Dalkon Shield advertisement violates Ohio Disciplinary Rule 2-101 (B), in that it conveys information not permitted to be conveyed under that rule and contains an illustration not permitted under that rule. It was stipulated before the hearing panel that the facts contained in the advertisement were not misleading, false, fraudulent or deceptive, though both the Board of Commissioners and the Ohio Supreme Court found that the advertisement was as a matter of law misleading because of the statement concerning contingent fees, and thus violated DR 2-101 (A).

It is likewise uncontroverted that Appellant placed the advertisements, that the Dalkon Shield advertisements contained language inviting people to contact Appellant, and that he accepted employment by persons who did contact him as a result of the advertisement. The Board and the Ohio

Supreme Court thus found violations of DR 2-103 (A) and DR 2-104 (A), concerning solicitation.

The Ohio Supreme Court and the Board aiso found a specific violation of DR 2-101 (B) (15) in that the terms of the contingent fee agreement proposed to be entered into were not disclosed in the advertisement.

ARGUMENT

It is Appellee's contention, for purposes of jurisdiction on appeal, that the Disciplinary Rules of the Code of Professional Responsibility are not statutes within the meaning of 28 U.S.C. 1257 (2). In the alternative, if the Court rejects this contention, or if the Court accepts this contention but grants certiorari, then it is Appellee's contention that the Disciplinary Rules of the Code of Professional Responsibility are statutory in character and designed to regulate the conduct of attorneys for the protection of the public and all citizens. *Supreme Court of Virginia v. Consumer's Union*, 446 U.S. 719 (1980), at page 731.

State statutes, in proceedings in which they are sought to be enforced against persons charged with violating them, do not have to be proven or justified by evidence submitted in those proceedings. The existence of a statute governing a matter is not an issue of disputed fact. The normal test as to the validity of the statute is whether there was a rational basis for the promulgating body to reach the conclusion it reached. The State of Ohio has a rational basis for the disciplinary rules it has adopted.

Neither *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), nor *In re RMJ*, 455 U.S. 191 (1982), speak to the issue of advertisements which solicit clients for a particular matter involving a particular product. Both cases involved advertisements giving very general information concerning the attorney and directed to areas of practice or fees. *In Re*

Primus, 436 U.S. 412 (1978), cited by Appellant, concerned political speech, not speech undertaken for pecuniary gain as here. *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), involved in-person solicitation and does not speak to solicitation undertaken through newspapers of general circulation and referring to an already known defendant and factual situation. In the absence of a clearly controlling federal constitutional right, Ohio may, and must, because of its substantial state interest in regulating the legal professional and in protecting its citizens, promulgate and enforce rules capable of being enforced by its regulatory system.

A. A SUBSTANTIAL STATE INTEREST JUSTIFIES CONTENT RESTRICTIONS ON ATTORNEY ADVERTISING

Where First Amendment rights of commercial speech are involved, the test of *Central Hudson Gas & Elect. Corp. v. Public Service Commission,* 447 U.S. 557 (1980), must be met. Thus the regulation must concern lawful activity, there must be a substantial government interest, the regulation must directly advance the interest asserted, and the regulation must not be more extensive than necessary to achieve that interest.

The extensiveness of the regulation, so far as commercial speech is concerned, is to be considered as it applies to the person challenging the resolution, and not to all persons who might conceivably challenge it for entirely different reasons. The First Amendment overbreadth doctrine, in other words, does not apply to commercial speech cases involving attorney advertising. *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), at page *380.*

The State of Ohio has a substantial interest in regulating the legal profession. Ohio's system of regulation of the legal profession is a system that involves both full time counsel,

paid through registration fees, and substantial effort on the part of attorneys who are members of the private bar and who are volunteers who may not be compelled by the state to perform legal services without compensation. No system of regulation which is dependent upon the volunteer services of a substantial number of persons for its effective functioning can realistically expect persons to voluntarily cooperate in the enforcement of rules with which they have substantial disagreement. The State of Ohio, then, has a substantial interest in both: (1) enforcing its disciplinary rules for the benefit of the public, and (2) promulgating disciplinary rules with which a large number of Ohio's attorneys are in substantial agreement.

The State of Ohio, in promulgating its rules concerning attorney advertising and solicitation, could rationally conclude that: (1) substantial effort on the part of the private bar is necessary for its regulatory system to function effectively, and (2) the private bar, since it has through its formal organizations traditionally called for and promulgated restrictions on attorney advertising and solicitation substantially similar to those involved in DR 2-101 (A) and (B), DR 2-103 (A), and DR 2-104 (A), would be less likely to support a regulatory system in which those or similar rules were not enforced.

The State of Ohio, moreover, could rationally conclude that the only kind of advertising rule which it can effectively enforce with its system of regulation is one that specifies what lawyers may advertise and prohibits all other kinds of information. Ohio is a large state with a large and diverse population of both attorneys and potential clients. Attorneys in the state may practice in the areas of law that vary from the simple and relatively routine to the complex and sophisticated. The persons to whom advertising is communicated vary from the simple, uneducated and uninformed, to the most sophisticated and highly educated. What may be misleading to one person may be informative to another, and vice versa. Given the complexity of modern law, the diffi-

culty in some specialities of law in determining whether a statement of law, much less of fact, is misleading, and the widespread availability of sophisticated marketing and research, and thus "targeting," techniques for potential recipients of legal advertising, the State of Ohio could rationally conclude that it does not have available to it sufficient resources to police legal advertising that has no governing standard other than whether it is false or misleading. Accordingly, it is rational for the State of Ohio to adopt a regulatory standard that specifies what may be communicated, on the ground that that can be more easily verified as true or not, and prohibits other information from being communicated.

The State of Ohio, in other words, can and has rationally concluded that an advertisement which (1) conveys information about a particular product made by a particular manufacturer (2) conveys medical and other information concerning the danger caused by that product which cannot be readily verified from usually available sources of information (3) informs the public that other clients are being represented in similar cases and (4) invites the reader to hire the attorney; may be prohibited in the public interest of regulating the legal profession.

Lawyers who advertise do so to attract clients. There is often a substantial pecuniary incentive in such instances to attract those clients. Where information (such as that obtained in depositions conducted by an attorney representing other clients) is in the control of the advertising attorney, there may be no way to judge, or even determine, if advertised information is accurate.

Given the substantial pecuniary interest of attorneys in attracting clients, and given the inevitably selective nature of advertising, the process of advertising by attorneys is not a reliable process for conveying accurate information to the public. In the instant case the medical information conveyed was available through other sources. Under Ohio's rules, attorneys remain free to convey information, including information concerning legal rights, in a non-advertising context in which the attorney does not accept employment as a result of communicating that information.

The issue involved in attorney advertising is not simply whether the public can benefit in receiving information that could be coming through such ads. The issue is also whether, given the availability of this information through other sources, given the ability of lawyers to communicate legal information in a variety of other circumstances in which no fee will be received as a result of the communication, and given the inherent unreliability of information conveyed in a context in which there is substantial opportunity for pecuniary gain and no reliable process to review the accuracy of that information, a state may rationally conclude that its interest in regulating the legal profession in an effective manner outweighs the interest of particular members of the public in receiving certain information that may be useful to them.

The State of Ohio has concluded that it may prohibit such communication in the interest of protecting the public. That conclusion is rational and, accordingly, Appellant's challenge to Ohio's disciplinary rules should be dismissed.

B. THE COMMUNICATION OF INFORMATION CONCERNING CONTINGENT FEES

Members of the public cannot be presumed to know what is meant by "contingent fee." Most people would not know, for example, that under most contingent fee agreements there can be substantial expenses of suit incurred by the client. Any statements such as "If there is no recovery, no legal fees are owed," or "Full legal fee refunded if convicted," the State of Ohio can rationally conclude, are misleading unless the essential terms of the agreement are conveyed to the public. It is not necessary to conclude from this that lawyers must specify in detail the terms and the costs in-

volved. At a minimum, however, the State may require that (1) potential clients not be left to believe that there are *no* costs involved if the client loses the case, and (2) attorneys not advertise that they are available to take criminal cases on a contingent fee basis when they may not legally do so.

C. THE USE OF ILLUSTRATIONS

The State of Ohio may rationally prohibit the use of illustrations other than the scales of justice or the attorney's picture. While the state may almost certainly not do so on the grounds that all such illustrations are inherently misleading (as Appellant mistakenly states the State of Ohio has done), the state may rationally conclude that illustrations in attorney advertising are so inherently subject to abuse and manipulation through emotional or subconscious appeals as to be incapable of effective regulation through rational legal process.

The scales of justice are generally accepted symbols of the rational balancing process of legal reasoning. And while the use of a lawyer's picture may not convey much information concerning the lawyer's legal ability, the state can rationally conclude that people seeking public approval have the right to communicate to the public what they look like.

D. THE DUE PROCESS ARGUMENT

There is no burden on a state, in a proceeding in which it seeks to enforce a statute or rule, to justify the existence of that statute or rule or to introduce evidence as to why a statute is reasonable. There is, similarly, no requirement under the Federal Constitution that a state have a particular theory as to why a statute applies, or which prohibits a state court from taking judicial notice of matters of common knowledge in its lower courts.

This is not, as in *Durham v. Brock,* 498 F. Supp. 213 (M.D. Tenn., 1980) a case in which a challenge has been brought against a regulation in a hearing conducted for the purpose of determining the validity of the regulation. It would be an impossible burden for the state, in any hearing brought under a particular statute, to require that the state must not only establish the facts which constitute a violation of the statute, but the validity of the statute itself. This argument assumes, incorrectly, that the law which governs a matter is somehow not the law, but a fact which must be proven like any other. The alleged unconstitutionality of a disciplinary rule is not a defense to its violation. *In the Matter of Felmeister,* 471 A. 2d 775 (N.J., 1984).

It was not, as Appellant states, changing *theories* in midstream that was condemned by this Court in *In re Ruffalo,* 390 US 544 (1968). In that case an attorney was charged with twelve counts of misconduct. After the Respondent testified, a thirteenth count was added. The Ohio Supreme Court found the attorney guilty of the thirteenth and one other count and imposed discipline. That order became final and was not reviewed by the U.S. Supreme Court. An action was then brought seeking discipline in the federal court system. The Federal Courts, relying on the Ohio findings, found sufficient evidence to justify only the thirteenth court, for which there was no prior notice. This Court held that to be insufficient to justify discipline, since there was no due process with respect to the thirteenth count, and reversed the federal discipline.

The instant case does not involve the addition of another count after testimony. The amended complaint of Appellee, filed December 17, 1982, contained nine counts alleging that by placing the advertisements Appellee had violated the following disciplinary rules: DR 2-101 (A) and (B), DR 2-101 (B) (15), DR 2-103 (A) and DR 2-104 (A). Both the Board and Supreme Court of Ohio found these rules had been violated. Appellant had notice that he was being charged with

violating them, and of the facts (the advertisements) which constituted the violations.

The function of a hearing panel under Ohio's System of disciplinary procedure is to determine facts and make recommendations based upon both the knowledge and experience of the panel's members and the evidence presented. Such a panel acts in an adjudicative capacity and may take judicial notice in accordance with Ohio's Rules of Evidence, Rule 201 (B). It remains the function of the courts to state the law, and the fact that the Board of Commissioners, or the Appellee, may have had a particular theory as to why a rule has been violated, creates no due process issue.

Appellant would be unlikely to argue before this court that because the prosecution has not established that a criminal defendant is being punished for reasons of "deterence" or "rehabilitation," the defendant should not be punished at all. Nor is it a plausible defense to a speeding charge that the prosecution has not established whether the theory justifying the restriction is to protect other drivers or to conserve gasoline.

Statutes and regulations generally involve several purposes or theories which might justify their existence. So long as a person charged with violating the rule is given notice of the rule, and of the facts which are alleged to violate it (in this case the advertisements) there is no issue of procedural due process. Similarly, where advertisements on their face are a violation of duly promulgated rules regulating either the content or manner of the advertisement, there is no factual or evidentiary issue presented. Either the rules are valid law or they are not.

CONCLUSION

This Court held in *Bates* that attorney advertising may not be subjected to blanket suppression. In *RMJ* this Court held that advertising by attorneys may not be restricted so as to require that they may advertise their availability to practice in an area of law that must be described by particular words —ie, "tort law" or "property law," but may not be described by other equally descriptive words such as "personal injury" and "real estate law." Neither case speaks to the issue of an advertisement concerning a particular matter involving a particular party and product. This Court in *RMJ* went on to say, moreover, that the state may regulate both communications that are misleading and communications that are not misleading where there is a substantial state interest in doing so. 455 U.S. 191 at 203.

There is no due process issue involved in Appellant's case. Appellant was given prior notice of the conduct which was alleged to violate the rules and of the rules alleged to be violated.

The Supreme Court of Ohio has found that the advertisements were misleading, in violation of DR 2-101 (A). Where the state has promulgated a rule permitting advertising of contingent fee rates only when certain information about costs and expenses are included, it may determine that as a matter of law the failure to provide any information concerning costs and expenses in an advertisement offering contingent fees, or information as to the realities of drunken driving charges in what is generally a plea bargaining situation, is misleading to the general public.

Respondent conduct clearly violates, on the face of the advertisements, the language of DR 2-101 (B), DR 2-103 (A), and DR 2-104 (A), (the language of which is contained in Appellant's Appendix E). Unless words in rules do not mean what they say, Appellant has violated these rules. Respondent could clearly be given a public reprimand for any one of

these violations and that is what the Supreme Court of Ohio, after reviewing the matter, has chosen to do. Accordingly, the Order of that Court should stand, and this court should not take jurisdiction.

Respectfully submitted,

/s/

A.J. Gagliardo
Disciplinary Counsel

/s/

Mark H. Aultman
Staff Counsel

OFFICE OF DISCIPLINARY COUNSEL
175 S. Third Street
Suite 280
Columbus, Ohio 43215
(614) 461-0256

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Appelliate Jurisdiction and to Petition for Certiorari have been served upon the Appellant's Counsel, Alan Morrison, Public Citizen Litigation Group, Suite 700, 2000 P Street, N.W., Washington, D.C. 20036, by United States mail, first class postage prepaid, on this ____ day of July, 1984. I further certify that all parties to be served have been served.

/s/

A.J. GAGLIARDO
Counsel of Record for Appellee

APPENDIX

OHIO CONSTITUTION ARTICLE IV SEC. 2

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) the supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968.)

RULE V
DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on July 1, 1983, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline of the Bar. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline of the Bar. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. The members of such Board shall be appointed from each of the Ohio Appellate Districts as follows: District 1, two members; District 2, one member; District 3, one member; District 4, one member; District 5, one member; District 6, two members; District 7, one member; District 8, three members; District 9, one member; District 10, two members; District 11, one member; and District 12, one member. Inital appointments under this rule shall be made as follows: Members appointed from former districts one (1), four (4) six (6), seven (7), eleven (11), twelve (12), thirteen (13), and fifteen (15), with remaining terms shall continue to serve for the same term for the new districts one (1), six (6), two (2), ten (10), nine (9), eight (8), eleven (11), and seven (7), respectively. The member appointed from new district three (3) shall be selected, by majority vote of the Supreme Court, from among the members appointed from former districts three (3) and sixteen (16). The members appointed from new district four (4) shall be selected, by majority vote of the Supreme Court, from among the members appointed from former district eight (8) and seventeen (17). The member appointed from new district five (5) shall be selected, by the majority vote of the Supreme Court, from among the members appointed from former districts nine (9) and ten (10). The members selected from

districts three (3), four (4) and five (5) shall continue to serve their present term. The remaining members shall be appointed by this Court for the following terms: One (1) member from district one (1) for the term ending 12-31-83; one (1) member from district six (6) for the term ending 12-31-85; one (1) member from district eight (8) for the term ending 12-31-84; one member from district ten (10) for the term ending 12-31-85; one member from district twelve (12) for the term ending 12-31-85. Thereafter the term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment with each member eligible for reappointment to one succeeding term. Any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by an appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Comissioners and of panels thereof. The Board of Commissioners shall meet in Columbus, Ohio, the first Friday after the second Monday during the months of February, April, June, August, October and December. The Chairman or the Secretary of the Board may call additional meetings of the Board when necessary.

(2) Jurisdiction of Board. The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court as hereinafter provided:

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension from the practice of law, or

(b) concerning the mental illness of any attorney and counselor at law, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct by an attorney affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court or a breach of these rules but did not take place in the presence of the court or a member thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of this Court to impose punishment with reference either to contempts or breaches of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to Disciplinary Counsel any matters coming to its attention for investigation, as hereinafter provided.

There is hereby created the position of Disciplinary Counsel. The Supreme Court shall appoint a Disciplinary Counsel and such assistants as necessary who shall be attorneys at law admitted to practice in this state and who shall not engage in the private practice of law while serving in that capacity.

In the event that a Grievance Committee of a local association determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the Chairman of the

Grievance Committee of the local bar association may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of the investigation to the committee which requested it.

All complaints alleging violations of DR 2-101, and DR 2-102(A) and (B) shall be referred to or filed with Disciplinary Counsel. Disciplinary Counsel shall have exclusive authority to investigate such complaints, file formal complaints with the Board and prosecute formal complaints filed with the Board. All formal complaints filed with the Board alleging violation of DR 2-101 and DR 2-102(A) and (B) shall be filed by the Disciplinary Counsel in the name of Disciplinary Counsel as relator. Proceeding in such matters shall be conducted in the same manner as all other disciplinary proceedings provided for in this rule.

The Disciplinary Counsel shall appoint, with the approval of the Supreme Court, staff personnel as required to satisfactorily complete investigation of matters referred to him pursuant to these rules or filed with him pursuant to Rule II of the Supreme Court Rules for the Government of the Judiciary. The Supreme Court shall fix the compensation of the Disciplinary Counsel and personnel employed by the Disciplinary Counsel and provide office facilities, furnishings, stationery, equipment and office supplies for the Disciplinary Counsel.

Funds for the operation of the Disciplinary Counsel's office, including compensation of the Disciplinary Counsel and staff, shall be provided from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

The Disciplinary Counsel shall be under the supervision of and responsible to the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar and the Board of Commissioners on Grievances and Discipline of the Judiciary created in Rule II of the Supreme Court Rules

for the Government of the Judiciary, and shall file annually with the Supreme Court and the Secretary a report of the activities and accomplishments of his office and a report of the expenses of operation of his office.

(4) Application of Rule; Authority and Duty of Bar Committees and Disciplinary Counsel. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law; all proceedings for the discipline of such attorneys and counselors at law, and persons under suspension or disbarred from the practice of law; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provision of this rule. Disciplinary Counsel and any committee authorized by any regularly organized local bar association shall investigate any matter referred to them or which comes to their attention, and may cause a complaint to be filed pursuant to this rule in cases where they find reasonable cause to believe that misconduct has occurred or that a condition of mental illness exists.

The investigation of complaints with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law shall be conducted by Disciplinary Counsel or the Grievance Committee of a local bar association. A local bar association may provide by its constitution, regulations or rules, for the appointment of lay persons as members of its grievance committee, provided that the majority of such committee shall consist of attorneys at law admitted to the practice of law by this Court.

The investigation of complaints shall be concluded within sixty days from the date of the receipt of the complaint. A decision as to the disposition of such complaint shall be made within thirty days thereafter. Extensions of time for completion of the investigation may be granted upon written

request, and for good cause shown, by the Secretary or Acting Secretary, of the Board of Commissioners on Grievances and Discipline of the Bar. If the investigation is not completed within sixty days from the date of filing the complaint and no written request has been made for an extension of time, the matter under investigation shall be referred to the Disciplinary Counsel. No extension of time shall be granted beyond one-hundred-fifty days from the date of receipt of the complaint. If an investigation by the Grievance Committee of a local bar association is not completed within one-hundred-fifty days from the date of filing the complaint, the matter under investigation shall be referred to the Disciplinary Counsel.

If a committee or Disciplinary Counsel determines upon investigation of a complaint that the filing of a formal complaint with the Board of Commissioners on Grievances and Discipline of the Bar is not warranted, the complainant shall be notified in writing of that determination.

The Grievance Committee of each local bar association shall file quarterly, by the fifteenth day of January, April, July, and October of each year, with the Disciplinary Counsel a report of the number of complaints made to the committee during the preceding quarter. The report shall specify the types of complaints filed, including commingling of funds, conviction of crime, failure to file income tax returns, failure to protect the interests of a client, soliciting, embezzlement, conversion, failure to account, excessive fees, mental illness and any other type of complaint not herein set forth. The report shall indicate the number of complaints filed, the number pending in each category and the number terminated by action of the committee during the reporting period.

The names of the Chairman of the Grievance Committee of the local bar association shall be reported in writing annually to the Disciplinary Counsel by the President of each local bar association.

The Board of Commissioners or any member thereof, Disciplinary Counsel, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall negelect or refuse so to assist in any such investigation or so to testify.

In the event that a Grievance Committee of a local bar association or Disciplinary Counsel shall in the case of a disciplinary investigation as provided for in this rule seek determination of a procedural question, the principal officer of a local bar association or the Chairman of its Grievance Committee or Disciplinary Counsel shall direct a written inquiry to the Chairman of the Board of Commissioners by filing it with the Secretary of the Board. Upon receipt of such written request, the Chairman of the Board of Commissioners may refer the inquiry to a panel of three members of the Board. The three-member panel shall be selected by the Secretary of the Board of Commissioners. The written request shall be documented with such facts, citations, statutory references and other written data that may be of assistance to make a determination of the matter presented. After the panel has completed its study of the problem presented, the panel shall make a written recommendation as to solution of the question. Upon receipt of such report and recommendation, the Chairman of the Board of Commissioners shall promptly convene the members of the Board who shall approve, reject, modify or otherwise dispose of the panel's recommendation. In the event that the question presented requires immediation attention for decision, the Chairman of the Board has the discretionary power to waive reference of the question to a panel, but shall submit the question or

questions presented to the entire Board for its decision.

Bar associations certified by the Supreme Court in accordance with Section (5)(c) of these rules may be reimbursed from the funds created by the registration fees collected, pursuant to Rule VI, for direct expenses incurred by such bar association in performing the obligations imposed on it by these rules, which shall be limited to costs for depositions, transcripts, copies of documents and for necessary travel expenses incurred outside the county of the local bar association. There shall be no reimbursement for the cost of any full-time or part-time investigators or time of other bar association personnel or attorneys in discharging these obligations. Reimbursement shall be made upon submission to the Disciplinary Counsel of receipted copies of invoices for the aforesaid purposes and upon the approval of the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar.

(5) Definitions.

(a) Misconduct. Misconduct shall mean any violation by an attorney of any provision of the oath of office taken upon admission to the practice of law in this State or any violation of the Code of Professional Responsibility as adopted by the Court from time to time, disobedience of these rules or of the terms of an order imposing a suspension from the practice of law, or the commission or convinction of a crime involving moral turpitude.

(b) Mental Illness. Mental illness shall mean the condition defined in R.C. 5122.01(A).

(c) Grievance Committee. Grievance Committee shall mean that committee designated by a local bar association, which association is certified by the Supreme Court of Ohio to be responsible for the investigation of allegations of misconduct by attorneys and mental illness affecting attorneys and the initiation of complaints as a result thereof under the provisions of these rules.

(6) Manner of Discipline. Each attorney and counselor at

law found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) suspension for a period of one year from the practice of law, or

(d) a public reprimand.

(7) Effect of Discipline. A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been suspended for a period of one year from the practice of law or who has been publicly repremanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) Automatic Indefinite Suspension from the Practice of Law for Conviction of an Offense Involving Moral Turpitude.

(a) Any attorney admitted to the practice of law in the State of Ohio who is convicted in this State of an offense, other than a petty offense as defined by the Ohio Rules of Criminal Procedure, or who is convicted of an equivalent offense under the laws of any other jurisdiction, shall be subject to an automatic indefinite suspension.

(i) A certified copy of the judgment entry of conviction of an attorney of an offense defined in this rule shall be transmitted forthwith by the judge entering such judgment to the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar. A certified copy thereof

shall also be transmitted forthwith to Disciplinary Counsel or the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in this State, wherein the attorney practices law or resides.

(ii) Upon receipt from any source of a certified copy of the judgment entry of conviction by the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar, the Secretary shall promptly cause such entry to be submitted to the Supreme Court whether the conviction resulted from a plea of guilty or a plea of nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(iii) The Court may enter such order as it deems appropriate, including an order immediately and indefinitely suspending the attorney from the practice of law.

(b) A certified copy of a judgment entry of conviction of an offense shall be conclusive evidence of the commission of that offense in any disciplinary proceedings instituted against an attorney based upon the conviction.

(c) Any disciplinary proceeding instituted against an attorney based upon a conviction of an offense shall not be brought to hearing until all appeals from the conviction are concluded.

(d) An attorney suspended under the provisions of this rule or Rule II of the Supreme Court Rules for the Government of the Judiciary shall be reinstated by the Court upon the filing with the Secretary of the Board of Commissioners of a certified copy of a judgment reversing the conviction of the crime. Such reinstatement shall not terminate any disciplinary investigation or proceeding then pending against the attorney.

(e) Duty of Clerk on Entering Order. Upon the entry of an order indefinitely suspending an attorney for conviction of an offense, the Clerk of the Court shall mail certified copies thereof as provided in Section (20) of these rules.

(9) The Complaint; Where Filed; By Whom Signed. A

complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Complaints filed by a Grievance Committee of any regularly organized local bar association in the State shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed by the President, Secretary, or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

Complaints filed by Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as Relator.

Upon the filing of a complaint with the Secretary of the Board, Relator shall forward a copy thereof to Disciplinary Counsel and the local bar association of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.

(10) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by certified mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon

counsel of record named in the complaint. Extensions of time for the filing of the answer may be granted, for good cause shown, by the Secretary of the Board of Commissioners.

(b) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (c) hereof, the Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

(c) Examination. If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(d) Duty of Clerk on Entering Order. Upon the entry of an order suspending an attorney for mental illness, the Clerk of the Court shall mail certified copies thereof as provided in paragraph one of Section (20) and shall change the registration of respondent to inactive status. No publication of such order shall be made but the order shall be a matter of public record.

(e) Termination. Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(11) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a

formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Secretary of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes. Requests for continuances may be granted by the Chairman of the panel for good cause shown.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(12) Authority of Panel; Dismissal. If the panel finds that the complaint or evidence is insufficient to support a charge of misconduct the panel may order that the complaint be dismissed. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, Disciplinary Counsel, and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.

(13) Referral by Panel. In the alternative, if the panel determines that findings of fact and recommendations for dismissal should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal in the same manner as provided in the following sections of this Rule V with respect to public reprimand, suspension or disbarment.

(14) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for a period of one year, suspension for an indefinite period, or permanent disbarment is merited,

the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(15) Review by Entire Board of Commissioners. Upon review, said Board of Commissioners may refer the matter back to the panel for futher hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the complaint is dismissed, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(16) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review. If the Board of Commissioners determines that a public reprimand, suspension for a period of one year, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(17) Show Cause Order Issued by the Court to Respon-

dent. On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by certified mail.

(18) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) Answer briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(20) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order; Duties of Disqualified or Resigned Attorney.

(a) After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, or acceptance of resignation from the practice of law, the Clerk of this Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent attorney (at his last known address), to the Disciplinary Counsel, to the local bar associa-

tion or associations in the county or counties in which such attorney resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit, and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the local bar association and by the publisher of the official reports of this Court. Such publication shall include a citation of the case in which the public reprimand was issued.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period or for a period of one year from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the local bar association. If any attorney resigns from the practice of law, the Clerk of this Court shall arrange for publication of the order of the Court in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the local bar association and by the publisher of the official reports of this Court.

(b) This court shall include in its order disbarring or suspending, for mental illness or disciplinary reasons, an attorney, or in any order pertaining to the resignation of an attorney, a time limit not to exceed thirty days, within which the disqualified attorney shall:

(i) Notify all clients being represented in pending matters and any co-counsel of his disbarment, suspension or resignation and his consequent disqualification to act an as attorney after the effective date of such order, and, in the

absence of co-counsel, also notify the clients to seek legal services elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;

(ii) Regardless of any fees or expenses due the attorney, deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

(iii) Refund any part of any feeds or expenses paid in advance that are unearned or not paid, and account for any trust money or property in his possession or control;

(iv) Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of his disqualification or resignation to act as an attorney after the effective date of such disqualification order, and file a notice of disqualification of counsel with the court or agency before which the litigation is pending for inclusion in the respective file or files;

(v) All notices required by such an order of this Court shall be sent by certified mail and shall contain a return address where communications may thereafter be directed to the disqualified attorney;

(vi) Within the time limit prescribed by this Court the disqualified attorney shall file with the Clerk of this Court and the Disciplinary Counsel an affidavit showing compliance with the order entered pursuant to this rule and proof of service of notices required by said order. Such affidavit shall also set forth the address where the affiant may receive communications, and said offices shall be kept advised of any later change in address by the disqualified attorney;

(vii) A disqualified attorney shall retain and maintain a record of the various steps taken by him pursuant to the order entered by this Court so that, upon any subsequent proceeding instituted by or against him, proof of compliance

with the order will be available for receipt in evidence.

(c) Whenever an attorney is suspended for mental illness, cannot be found in the jurisdiction for a period of sixty days or more, dies, refuses to meet or work with a significant number of clients for a period of sixty days or more, or fails to comply with Section (b) of this rule, and no partner, executor or other responsible party capable of conducting the attorney's affairs is available and willing to assume appropriate responsibility the Disciplinary Counsel may appoint an attorney or attorneys or a local bar association to inventory the files of such attorney and to take such action, including action set forth in Section (b) herein, as is necessary to protect the interest of clients of such attorney. Upon approval by the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar, Disciplinary Counsel may allow reasonable fees to be paid to such appointed attorney or attorneys from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar. An attorney or bar association so appointed shall not, except as necessary to carry out the order of appointment by the Disciplinary Counsel, disclose any information contained in files so inventoried without the written consent of the client to whom such file relates. Such attorney may not represent that client.

(21) Proceedings Private; Exceptions. All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) where the Respondent shall request in writing that they be public, or

(b) where the Respondent by voluntary act waives privacy of the proceedings, or

(c) where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or suspension for a period of one year, or

(d) where any disciplinary matter is heard by the

Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(22) Suspension for One-Year Period; Reinstatement. At the expiration of a suspension for a period of one year, the Respondent shall be reinstated to the practice of law, upon application by the Respondent. Said application shall be in writing and filed with the Clerk of this Court. It shall indicate the date such suspension was ordered, shall include an affidavit by Respondent indicating whether any formal disciplinary proceedings are pending against said Respondent, and request reinstatement pursuant to this rule. This Court shall order said Respondent reinstated, provided that all costs of the proceedings as ordered by the Court have been paid, that the Respondent has complied with the order of suspension, and that no formal disciplinary proceedings are pending against Respondent. The Clerk of this Court shall provide notice of such reinstatement to all persons or organizations who received copies of the disciplinary order of this Court ordering Respondent's suspension.

(23) Petition for Reinstatement. No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(24) Contents of Petition for Reinstatement. Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the Petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possesses all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

(25) Costs to be Deposited with Petition for Reinstatement. Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(26) Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such

case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule I of the Supreme Court Rules for the Government of the Bar of Ohio shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(27) Petition for Reinstatement Referred to Board of Commissioners. Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(28) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners. The Secretary of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (24) (c). Such hearing shall be public. Any interested person, any member of the Bar, and Disciplinary Counsel may appear before the hearing panel in support of or in opposition to the petition.

In the event that the Grievance Committee of a local bar association referred to in Section (24) of this rule determines that matters relating to petitioner's qualifications for rein-

statement are sufficiently serious and complex as to require the assistance of Disciplinary Counsel, the chairman of such committee shall direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of his investigation to the committee which requested it.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing of such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (24) (c) shall have ten (10) days from receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(29) Manner of Service. Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by certified mail.

(30) Quorum of Panel or Board. A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(31) Clerk is Agent for Service of Notices on Nonresident Attorney. Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law, pursuant to this rule.

(32) Manner of Service on Clerk; Record of Such Service Not a Public Record. All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by certified mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the services, upon said Clerk of this Court, addressed to such Respondent at his last known address. The receipt indicating the certified mail number shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(33) Power to Issue Subpoenas. In investigations and proceedings under this rule, upon application by Disciplinary Counsel, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state authorized to sign a complaint under Section (9) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before Disciplinary Counsel, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(34) May Order Depositions. The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this state in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(35) Effect of Refusal to Testify. The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(36) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(37) Docket of Complaints. The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(38) Board May Prescribe Rules. The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(39) Rule to be Liberally Construed. The process and procedure under this rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This rule and such regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this rule. To the extent that application of this amended rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended rule became effective shall continue to apply.

RULE VI
REGISTRATION OF ATTORNEYS

(1) Every attorney at law admitted to the practice of law in the State of Ohio shall file with the Clerk of this Court a Certificate of Registration together with a registration fee of Fifty Dollars ($50.00) per year payable biennially, upon a form to be furnished by the Clerk, said sum to be used for investigation of complaints of alleged misconduct pursuant to Section (3) of Rule V of these rules, and Rule II of the Supreme Court Rules for the Government of the Judiciary, alleged unauthorized practice of law and such other purposes deemed necessary by the Supreme Court of Ohio for the Government of the Bar and of the Judiciary of Ohio.

(2) The Certificate of Registration shall be filed and the registration fee paid on or before September 1, 1983, and shall be for the period of September 1, 1983 to August 31, 1985.

(3) Thereafter, in each odd-numbered year, a new Certificate of Registration shall be filed and the registration fee paid on or before September 1 of that year.

(4) Persons admitted to the practice of law in this State between biennial registration dates shall file a Certificate of Registration at the time of admission and pay a fee of One Hundred Dollars ($100.00), unless such admission and registration occurs during the second year of the biennial registration period, in which event the fee shall be Fifty Dollars ($50.00).

(5) Every attorney admitted to the practice of law in another state but not in Ohio who performs legal services in this State solely for his employer as a full-time employee shall also file a Certificate of Registration and pay the fee as required by the foregoing sections of this rule. Said registration shall continue in force only so long as such attorney is so employed.

(6) An attorney who has not filed a Certificate of Registration and paid the required fee who practices law or holds himself out as authorized to practice law or who holds judicial office in this state shall be subject to disciplinary proceedings pursuant to Rule V of the Supreme Court Rules for the Government of the Bar of Ohio or Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio.

(7) Any attorney admitted to the practice of law in Ohio may acquire inactive status by making application to the Clerk for exemption from payment of the registration fee at the time of filing his Certificate of Registration. Such inactive attorney shall not be entitled to practice law nor hold himself out as authorized to practice law nor hold judicial office in this State until such time as he requests and is granted reinstatement to active status.

A-30

JUDICIAL NOTICE

Rule 201

JUDICAL NOTICE OF ADJUDICATIVE FACTS

(A) Scope of Rule. This rule governs only judical notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(C) When Discretionary. A court may take judicial notice, whether requested or not.

(D) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(G) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Office - Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2166 (3)

IN THE

Supreme Court of the United States

October Term, 1984

PHILIP Q. ZAUDERER,
Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee.

On Appeal from the Supreme Court of Ohio

JOINT APPENDIX

Alan B. Morrison
(Counsel of Record)
David C. Vladeck

Public Citizen
Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David R. Frank

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Counsel for Appellant

Angelo J. Gagliardo
Disciplinary Counsel for
the Supreme Court of Ohio
(Counsel of Record)

Mark H. Aultman
Office of Disciplinary Counsel
Staff Counsel

Office of Disciplinary Counsel
175 S. Third Street, Suite 280
Columbus, Ohio 43215
(614) 461-0256

Counsel for Appellee

APPEAL DOCKETED July 2, 1984
PROBABLE JURISDICTION NOTED October 1, 1984

CONTENTS

Page

RELEVANT DOCKET ENTRIES 1

COMPLAINT 3

STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT 9

AMENDMENT TO STIPULATION OF FACT 21

AMENDED COMPLAINT 22

ANSWER 27

SECOND STIPULATION OF FACT 40

EXHIBIT C (Letter of Philip Q. Zauderer, dated December 1, 1981) 43

EXHIBIT 4 (Ohio State Bar Association advertisement) 45

EXHIBIT 5 (Ohio State Bar Association advertisement) 46

EXHIBIT 6 (Ohio State Bar Association advertisement) 47

EXHIBIT 7 (Ohio State Bar Association advertisement) 48

EXHIBIT 8 (Ohio State Bar Association advertisement) 49

EXHIBIT 9 (Ohio State Bar Association advertisement) 50

EXHIBIT 10 (Ohio State Bar Association advertisement) 51

OPINION OF THE SUPREME COURT OF OHIO (omitted, set forth in Appendix to Jurisdictional Statement at 1a)

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE (omitted, set forth in Appendix to Jurisdictional Statement at 8a)

ORDER OF THE OHIO SUPREME COURT IMPOSING PUBLIC REPRIMAND ON APPELLANT (omitted, set forth in Appendix to Jurisdictional Statement at 22a)

RELEVANT DOCKET ENTRIES (BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO)*

July 29, 1982	Complaint and Certificate filed.
September 13, 1982	Stipulation of Fact between Relator and Respondent filed.
September 13, 1982	Motion to Dismiss and Brief of Respondent filed, along with accompanying affidavits of Robert L. Hallet, Beverly J. Carr, Kay M. Carver, and Respondent.
October 25, 1982	Memorandum of Relator in Opposition to Motion to Dismiss filed.
November 3, 1982	Order denying Motion to Dismiss entered.
November 12, 1982	Motion by Respondent to Reconsider filed.
November 22, 1982	Memorandum of Relator in Opposition to Motion to Reconsider filed.
November 23, 1982	Amendment to Stipulation of Fact filed.
November 24, 1982	Order denying Reconsideration entered.
December 17, 1982	Amended Complaint filed.
January 14, 1983	Answer of Respondent filed.
May 24, 1983	Second Stipulation of Fact between Relator and Respondent filed.
May 24, 1983	Trial Brief of Respondent filed.
May 24, 1983	Hearing held before a Panel of Board of Commissioners and Grievances of the Supreme Court of Ohio.

* The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio does not maintain a formal docket. The Board's "docket" entries are taken from the documents filed with the Secretary and Chairman of the Board in Case No. 454, *In Re. Complaint Against Philip Q. Zauderer*, before the Board decision was certified to the Supreme Court of Ohio.

June 13, 1983	Post-trial Brief of Relator filed.
June 13, 1983	Post-trial Brief of Respondent filed.
June 16, 1983	Reply Brief of Respondent filed.
June 24, 1983	Decision of Panel and Board of Commissioners Entered.
July 20, 1983	Order to Show Cause regarding briefing schedule entered.
August 19, 1983	Extension of time to file brief of Respondent until August 24, 1983, entered.
August 19, 1983	Brief of Dispatch Printing Company as *amicus curiae* filed.
August 24, 1983	Objections of Respondent filed.
August 24, 1983	Brief of Respondent filed.
August 24, 1983	Brief of American Civil Liberties Union Foundation of Ohio, Inc. as *amicus curiae* filed.
August 24, 1983	Brief of Ohio Newspaper Association as *amicus curiae* filed.
September 23, 1983	Brief of Relator filed.
October 12, 1983	Reply Brief of Respondent filed.
December 1, 1983	Statement of Reliance on Additional Authorities filed by Respondent.
December 6, 1983	Oral Argument held.
April 4, 1984	Decision of Ohio Supreme Court entered.
April 4, 1984	Order imposing public reprimand and costs against Respondent entered.
April 27, 1984	Motion for Stay of Order to Pay Costs and Memorandum in Support of Motion filed.
May 23, 1984	Notice of Appeal by Respondent filed.

BEFORE THE BOARD OF COMMISSIONS ON GRIEVANCES AND DISCIPLINE OF THE SURPEME COURT OF OHIO

In re:
Complaint against
Philip Q. Zauderer
52 West Whittier
Columbus, Ohio 43206
RESPONDENT

Office of Disciplinary Counsel
360 South Third Street, Suite #109
Columbus, Ohio 43215
RELATOR

No. 454

COMPLAINT AND CERTIFICATE (Rule V of the Supreme Court Rules for the Government of The Bar Ohio.)

Now comes the Relator and alleges that Philip Q. Zauderer, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

COUNT I

1. Relator, Office of Disciplinary Counsel, is authorized to file this complaint pursuant to Gov. Rule V.
2. Philip Q. Zauderer, Respondent, was admitted to the practice of law in the State of Ohio on October 17, 1964, and is subject to the Rules for the Government of the Bar of Ohio.

COUNT II

3. On November 25 and 26, 1981, Respondent caused to be published in the Columbus Citizen Journal an advertisement offering legal services by him, wherein he offered "a full legal refund if convicted" of "drunk driving." (Exhibit "A").
4. Relator alleges that this legal service advertisement constitutes an offer of a "contingent fee" for services rendered in a criminal matter, which offer violates Disciplinary Rule 2-101(B)(15).

COUNT III

5. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:

6. Relator says that contingency fees in criminal cases are specifically prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.
7. Relator alleges that advertising himself as being available to perform a legal service under conditions which are not permitted under the Code of Professional Responsibility constitutes a violation of Disciplinary Rule 2-101(A) in that such representation is false, fraudulent, misleading, and deceptive to the public.

COUNT IV

8. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
9. Disciplinary Rule 2-101(B) sets forth the list of information which can be published in a legal service advertisement.
10. On or about March 11, 1982, Respondent caused to be published in the Columbus Citizen-Journal an advertisement which contained substantial information which is not permitted by Disciplinary Rule 2-101(B), including reference to a specific, potential legal problem, which language is not necessary to advise the public of information which is needed to enable a consumer to properly identify or evaluate, a legal need. (Exhibit "B").
11. During March, April and May 1982, Respondent caused the same legal service advertisement or an advertisement essentially identical in nature, to be run in several daily newspapers throughout the State of Ohio.
12. Relator alleges that the content of said ad constitutes a violation of Disciplinary Rule 2-101(A)(B).

COUNT V

13. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
14. Disciplinary Rule 2-101(B) prohibits the use of "drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics, or other use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scale of justice" in a legal service advertisement.
15. The advertisement referenced in the preceding Count IV includes a drawing or other illustration of an "I.U.D.".

16. Relator alleges that the publication of said drawing or illustration in a legal service advertisement constitutes a violation of Disciplinary Rule 2-101(B).

COUNT VI

17. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
18. Disciplinary Rule 2-101(B) provides that legal service adertisements must be "presented in a dignified manner."
19. Relator alleges that the inclusion of a drawing or illustration or other representation of an I.U.D. in a legal service advertisement and the inclusion of comments which are directed at exciting action rather than informing the public does not constitute a "dignified manner" for informing a consumer of the availability of a practitioner to perform certain legal services, and that such material is detrimental to the public and serves no legitimate purpose which should or need be approved for legal service advertising and that such conduct constitutes a violation of Disciplinary Rules 2-101(A)(B) and 1-102(A)(6).

COUNT VII

20. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
21. Relator asserts that prior to November, 1981, Respondent caused a certain advertisement to be published in newspapers, as a result of which Relator had discussions with Respondent pertaining to the existence of relevant rules of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio and as then were in effect and which pertained to the legal service advertisement which Respondent was then running.
22. Relator states that as a result of its correspondence and meetings with Respondent in regard to the prior advertisement, Respondent was completely informed of all prohibitions contained in Disciplinary Rule 2-101 and other relevant sections of the Code of Professional Responsibility.
23. Relator alleges that Respondent thereafter had full knowledge of the relevant sections of the Code of Profes-

sional Responsibility and that the placement of the two advertisements now in question was done with the intent to violate Disciplinary Rule 2-101, all of which constitutes a violation of Gov. Rule V and the oath of Office.

/s/ Charles W. Kettlewell
Assistant Disciplinary
Counsel
360 South Third Street, Suite
#109
Columbus, Ohio 43215
Counsel for Relator

CERTIFICATE

The undersigned Leonard J. Stern of the Office of Disciplinary Counsel Association hereby certifies that Charles W. Kettlewell, Assistant Disciplinary Counsel, is duly authorized to represent Relator in the premises and does accept the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated July 28, 1982
/s/ Leonard J. Stern
Leonard J. Stern
Disciplinary Counsel

(Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.)

Section (8)

THE COMPLAINT, BY WHOM SIGNED. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved.

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

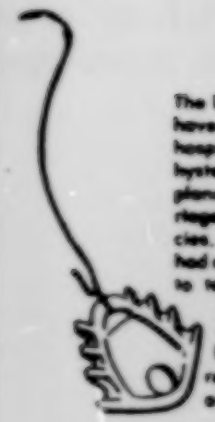
Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

EXHIBIT "A"

DID YOU USE THIS IUD?



The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates

52 West Whittier Street
Columbus, Ohio 43206

EXHIBIT "B"

BEST AVAILABLE COPY

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In Re:	:
Complaint Against	:
Philip Q. Zauderer	:
	:
Respondent	:Case No. 454
Office of Disciplinary Counsel	:
Relator.	:

STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT

The Relator and Respondent and their counsel, for the puposes of this proceeding and without the necessity for evidence, hereby stipulate and agree that the following facts are true and can and should be treated as such by the Board:

[Relating To Count I Of Relator's Complaint]

1. Gov. Rule V authorizes the Relator, Office of Disciplinary Counsel, to file the Complaint which was filed against the Respondent on July 29, 1982.

2. The Respondent, Philip Q. Zauderer of Columbus, Ohio, was admitted to the practice of law in Ohio on October 17, 1964. Since that time, no disciplinary complaint, other than that filed by the Relator in this case, has ever been filed with the Board of Commissioners against him.

[Relating To Count II & III Of Relator's Complaint]

Drunk Driving Advertisement

3. The respondent caused the advertisement attached to the Relator's Complaint as Exhibit A to be published in *The Columbus Citizen-Journal*, a newspaper of general circulation, on November 25 and 26, 1981.

4. Upon receipt of a telephone call from the Relator regarding the said advertisement on or about November 26, 1981, the Repondent promptly withdrew it.

5. Respondent has asserted by affidavit, and Relator does not contest, that as a result of the advertisement, the Respondent

was approached by two potential clients but declined to represent them, and that the Respondent did not "enter into an arrangement for, charge, or collect a contingent fee for representing a client" in a drunk driving or other criminal case.

6. Prior to November, 1981, and during the period of May 26, 1981 through August 18, 1981, the Respondent and counsel for the Relator discussed DR 2-101 and the leading United States Supreme Court cases regarding legal service advertising.

7. Disciplinary Rule 2-106(C), promulgated by the Supreme Court of Ohio on October 5, 1970, and in effect on November 25 and 26, 1981, provides that:

> A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

8. Disciplinary Rule 2-101(A), promulgated by the Supreme Court of Ohio on November 28, 1977 and in effect on November 25 and 26, 1981, and since that time, provides that:

> A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

9. Disciplinary Rule 2-101(B)(15), promulgated by the Supreme Court of Ohio on November 28, 1977, and in effect on all relevant dates, provides that:

> DR 2-101(B) *** Only the following information may be published or broadcast:
>
> (1) ***
>
> ***
>
> (15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.
>
> (16) ***

[Relating to Counts IV Through VII Of Relator's Complaint] Dalkon Shield Advertisement

10. Disciplinary Rule 2-101(B), promulgated by the Supreme Court of Ohio on November 28, 1977, and commonly known as the Legal Service Advertising Rule, last amended on June 11, 1979, provides as follows:

> (B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county, and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:
>
> (1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;
>
> (2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized by DR 2-105.
>
> (3) Age;
>
> (4) Date of admission to the bar of a state, or federal court or administrative board or agency;
>
> (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
>
> (6) Public or quasi-public offices;
>
> (7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

11. By correspondence and other communications during the period of May 26, 1981 through August 18, 1981, the Respondent and Counsel for Relator discussed advertisements proposed to be run by the Respondent, including the Dalkon Shield advertisement of Minnesota attorneys Appert & Pyle (set forth below), upon which the Dalkon Shield advertisement in question in this case was based:



DID YOU USE THIS IUD?

The Dalkon Shield Intrauterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing many women on such cases. The cases are handled on a contingent fee basis for one-third of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For more information call toll free 1-800-328-1070 In Minnesota call collect 612/338-2111 or write

The law firm of

APPERT & PYLE

Suite 970 First Bank Place West 332 Minnesota Street Minneapolis, Minnesota 55401

BEST AVAILABLE COPY

12. Prior to October, 1981, counsel for the Relator advised the Respondent that the Appert & Pyle advertisement and a second advertisement proposed by the Respondent (which was never published) did not comply with Ohio's DR 2-101(B).
13. In a case where the charges were similar to but not identical to the charges in this case, and where the disciplinary rule in question was not identical to Ohio's DR 2-101, on December 18, 1981, the Supreme Court of Minnesota in *Matter of Discipline of Appert & Pyle*, 315 N.W. 2d 204 (1981) held, as noted in syllabus 1 of the decision, at page 205:

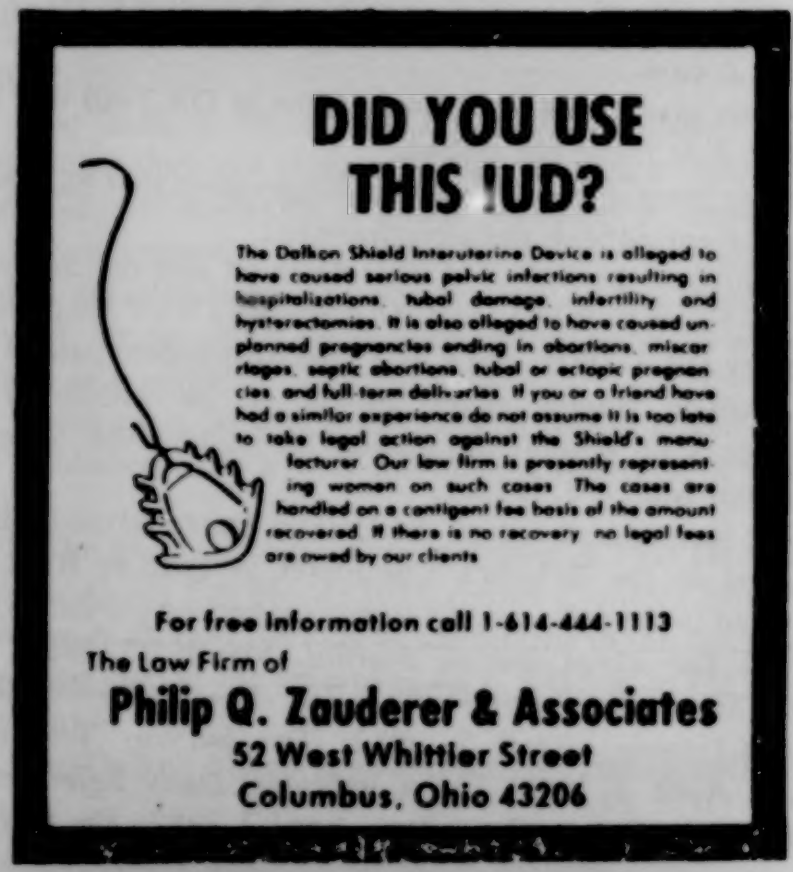
> 1. It is an unconstitutional restriction on an attorney's and the public's first amendment rights to prohibit attorneys from publishing or otherwise distributing written advertisements as long as the advertisements do not contain false, fraudulent, deceptive, or misleading information.

14. On January 25, 1982, the United States Supreme Court issued a landmark decision concerning lawyer advertising in a case captioned *Matter of R.M.J.*, 102 S.Ct. 929 (1982).
15. Because of its significance, the R.M.J. decision was printed in its entirety in the *Ohio State Bar Association Report*, Vol. 55, No. 8, February 22, 1982, at pages 309-318 inclusive.
16. The Court summarized "commercial speech doctrine" in the *R.M.J.* case at page 937, where it stated:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading

> information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

17. Prior to the *R.M.J.* decision being reported in the *Ohio State Bar Association Report*, Judge Stern of the Office of Disciplinary Counsel (Relator) mailed a copy of the said decision to various lawyers, including the Respondent.
18. After *R.M.J.* was published, the Respondent telephoned Judge Stern for an appointment to discuss *R.M.J.* and Ohio's Rule on lawyer advertising, DR 2-101.
19. On Friday, March 5, 1982, at 3:30 p.m., the Respondent and Judge Stern met in Judge Stern's office for approximately 45 minutes.
20. During the meeting of March 5, 1982, the Respondent showed Judge Stern a proposed newspaper advertisement (based on the Appert & Pyle advertisement), a copy of which proposed advertisement is set forth below and attached to the Relator's Complaint as Exhibit B:



BEST AVAILABLE COPY

21. The Respondent asked Judge Stern whether or not he thought the said Dalkon Shield advertisement was in compliance with the law as set forth by the United States Supreme Court in *R.M.J.*
22. Judge Stern advised the Respondent that the Office of Disciplinary Counsel does not have authority to issue advisory opinions nor to approve or disapprove legal service advertisements.
23. Judge Stern advised the respondent that it was Judge Stern's interpretation of *R.M.J.* that "misleading" information cannot be published in a legal advertisement.
24. The Ohio Rules governing lawyer advertising were discussed, and it was recognized by both the Respondent and Judge Stern that the Dalkon Shield advertisement did not conform to the Ohio rule, DR 2-101(B).
25. Judge Stern advised the Respondent that one could not tell how much viability remained in DR 2-101 subsequent to the *R.M.J.* case; and that the Supreme Court of Ohio had taken no position on DR 2-101(B) subsequent to the announcement of the *R.M.J.* case.
26. It was agreed that there were items in DR 2-101 that the Court in *R.M.J.* did not discuss.
27. Judge Stern did not advise the Respondent that he should or should not publish the advertisement.
28. Following the *Appert & Pyle* decision and the Supreme Court decision in *R.M.J.*, and the discussion with Judge Stern regarding DR 2-101(B) and *R.M.J.*, the Respondent caused the said Dalkon Shield advertisement to be published in newspapers of general circulation throughout the State of Ohio after March 8, 1982.
29. The Respondent caused the Dalkon Shield advertisement (attached to the Relator's Complaint as Exhibit B) to be published in the following Ohio newspapers on the date(s) indicated: *The Akron Beacon Journal,* March 23, 1982; *The Athens Messenger,* April 7, 1982; *The (Bowling Green) Daily Sentinel-Tribune,* April 7, 1982; *The Bucyrus Telegraph-Forum,* April 7, 1982; *The (Cambridge) Daily Jeffersonian,* April 7, *The Canton Repository,* April 7, 1982; *The (Celina)*

Daily Standard, April 8, 1982; *The Cincinnati Post,* March 2, 1982; *The Circleville Herald,* April 7, 1982; *The Coshocton Tribune,* April 19, 1982; *The (Defiance) Crescent-News,* April 7, 1982; *The Delaware Gazette,* April 7, 1982; *The Delphos Herald,* April 7, 1982; *The (East Liverpool) Evening Review,* April 8, 1982; *The Findlay Courier,* April 7, 1982; *The Hamilton Journal-News,* April 6, 1982; *The Kent-Ravenna Record-Courier,* April 2, 1982; *The Lancaster Eagle-Gazette,* April 8, 1982; *The Logan Daily News,* April 1 & 2, 1982; *The (London) Madison Press,* April 5, 1982; *The Mansfield News Journal,* March 22, 1982; *The Martins Ferry Times-Leader,* March 24, 1982; *The (Massillon) Evening Independent,* April 12, 1982; *The (New Philadelphia) Times Reporter,* April 5, 1982; *The (Napoleon) Northwest-Signal,* April 12, 1982; *The Niles Times,* March 31, 1982; *The Portsmouth Times,* April 7, 1982; *The Sandusky Register,* April 7, 1982; *The Troy Daily News,* May 22, 1982; *The Upper Sandusky Chief Union,* March 22, 1982; The (Washington Court House) Record-Herald, April 7, 1982; *The Wooster Daily Record,* April 7, 1982; *The Xenia Daily Gazette,* April 6, 1982; *The Zanesville Times Recorder,* April 5, 1982.
30. The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
31. The newspapers were requested by the Respondent to publish the advertisement when grocery advertisements were heaviest, in an effort to provide information to as many women as possible.
32. Newspapers in which the Dalkon Shield advertisement was published have a total combined circulation of approximately _____.
33. In the *Matter of Discipline of Appert & Pyle* (Minnesota Supreme Court File No. 48803), retired District Court Judge Clarence A. Rolloff, serving as the referee in the disciplinary poceeding, found the following facts relating to the Dalkon Shield to be true:

A. The Dalkon Shield is an intrauterine contraceptive

devise (I.U.D.) manufactured by the A.H. Robins Co., hereinafter referred to as Robins. The device was designed in the 1960's by Dr. Hugh Davis of Johns Hopkins University and Mr. Irwin Lerner.

B. On June 12, 1970, Robins bought all patent rights to the Dalkon Shield for approximately $750,000.00 plus a ten percent royalty agreement plus employing Dr. Davis as a consultant.

C. Thereafter, Robins began national marketing of the Dalkon Shield. The Robins company estimates that nationally, approximately 2.2 million devices were inserted in women from 1970 through 1975.

D. At the time the Dalkon Shield was first marketed, it was recognized as a medica! device rather than a drug and did not therefore require Food & Drug Administration (FDA) approval prior to marketing.

E. After national marketing of the Dalkon Shield began, a variety of medical problems surfaced allegedly related to the use of the device.

F. Congressional hearings were conducted in 1973 and 1974 concerning whether the FDA ought to be empowered to regulate intrauterine devices, but it was not until early 1976 when new legislation conferred such authority on the FDA.

G. On June 28, 1974, sales of the Dalkon Shield in the United States were suspended by Robins.

H. A specific investigation of Robins began in August 1974, resulting in an FDA advisory committee recommendation that the Dalkon Shield be permitted to be remarketed if Robins made certain design changes. In approximately February of 1975, Robins decided to abandon efforts to remarket the Dalkon Shield.

I. Numerous individual civil actions involving the Dalkon Shield have been initiated against Robins.

J. The Plaintiffs in such cases have alleged numerous injuries as a result of the use of the product including total hysterectomies, septic abortions,

miscarriages, uterine infections causing infertility, severe cramping and bleeding, pain with intercourse, as well as accompanying loss of consortium, psychological and emotional injuries.

K. The actions have proceeded on a number of legal theories including negligence, breach of implied warranty, breach of express warranty, strict liability, misrepresentation under Section 402(b) of the Restatement of Torts, civil conspiracy, gross and wanton negligence, willful misrepresentation, fraud and local consumer protection statutes.

L. Robins aggressively advertised the Dalkon Shield both before and after learning of its defects, misrepresented its dangers and defects to doctors and others, and never undertook to inform the public generally or individuals about those dangers and defects.

M Neither the Robins Company, the FDA, the AMA, nor any other agency or organization had taken steps to inform all users of the Dalkon Shield of its dangers and defects.

N. Because of their nature, the Dalkon Shield civil cases are not amenable for the bringing of a class action.

34. In being admitted to the Ohio bar, the Respondent undertook the following oath of office:

I Do Solemnly Swear:

I will support the Constitution of the United States and the Constitution of the State of Ohio;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are con-

sistent with truth and honor and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice, So Help Me God.

The foregoing Stipulations Of Fact are hereby entered into on this 13th day of September, 1982.

/s/ C. W. Kettlewell
C. W. Kettlewell
Office of Disciplinary Counsel

360 South Third St.,
Suite 109
Columbus, Ohio 43215
(614) 461-0256
Counsel for Relator

/s/ David K. Frank
David K. Frank
SCHWENKER, CLOUD & TUDOR

8 East Broad Street

Columbus, Ohio 43215
(614) 228-8787
Counsel for Respondent

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	
Philip Q. Zauderer,	:	
52 West Whittier		
Columbus, Ohio 43206	:	
Respondent	:	Case No. 454
Office of Disciplinary Counsel,		
360 S. Third Street, Suite 109	:	
Columbus, Ohio 43215	:	
Relator.		

AMENDMENT TO STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT

The Stipulation of Fact entered into by the parties on September 13, 1982, is hereby amended as follows:

1. In Paragraph 29 of the said Stipulation of Fact, two additional newspapers should be included in the list of papers in which the Dalkon Shield advertisement appeared, *The Columbus Citizen-Journal*, March 11, 1982, and *The Columbus Dispatch*, March 10. 1982.

2. In Paragraph 32 of the said Stipulation of Fact, the following number, representing the approximate total combined circulation of the newspapers in which the Dalkon Sheld advertisement appeared, should be inserted: 1,180,160.

The foregoing Amendment is hereby executed on this 17th day of November, 1982.

/s/ C. W. Kettlewell
C. W. Kettlewell
OFFICE OF DISCIPLINARY COUNSEL
360 South Third Street
Suite 109
Telephone: (614) 461-0256
Counsel for Relator

/s/ David K. Frank
David K. Frank
SCHWENKER, CLOUD & TUDOR
8 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 228-8787
Counsel for Respondent

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	
Philip Q. Zauderer,	:	
52 West Whittier		
Columbus, Ohio 43206	:	
Respondent	:	Case No. 454
Office of Disciplinary Counsel,		
360 S. Third Streeet, Suite 109	:	AMENDED COMPLAINT
Columbus, Ohio 43215		
Relator.		

Now comes the Relator and alleges that Philip Q. Zauderer, an Attorney-at-Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

COUNT I

1. Relator, Office of Disciplinary Counsel, is authorized to file this Complaint pursuant to Gov. Rule V.
2. Philip Q. Zauderer, Respondent, was admitted to the practice of law in the State of Ohio on October 17, 1964, and is subject to the Rules for the Government of the Bar of Ohio.

COUNT II

3. On November 25, 1981, and November 26, 1981, Respondent caused to be published the Columbus Citizen Journal an advertisement offering legal services by him, wherein he offered "a full legal refund if convicted" of "drunk driving". (Exhibit A).
4. Relator alleges that this legal service advertisement constitutes an offer of a "contingent fee" for services rendered in a criminal matter, which offer violates Disciplinary Rule 2-101(B)(15).

COUNT III

5. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:

6. Relator says that contingency fees in criminal cases are specifically prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.
7. Relator alleges that advertising himself as being available to perform a legal service under conditions which are not permitted under the Code of Professional Responsibility constitutes a violation of Disciplinary Rule 2-101(A) in that such representation is false, fraudulent, misleading, and deceptive to the public.

COUNT IV

8. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
9. Disciplinary Rule 2-101(B) sets forth the list of information which can be published in a legal service advertisement.
10. On or about March 11, 1982, Respondent caused to be published in the Columbus Citizen-Journal an advertisement which contained substantial information which is not permitted by Disciplinary Rule 2-101(B), including reference to a specific, potential legal problem, which language is not necessary to advise the public of information which is needed to enable a consumer to properly identify or evaluate, a legal need (Exhibit B).
11. During March, April and May of 1982, Respondent caused the same legal service advertisement or an advertisement essentially identical in nature, to be run in several daily newspapers throughout the State of Ohio.
12. Relator alleges that the content of said ad constitutes a violation of Disciplinary Rule 2-101(A) and (B).

COUNT V

13. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
14. Disciplinary Rule 2-101(B) prohibits the use of "drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics, or other use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scale of justice" in a legal services advertisement.

15. The advertisement referenced in the preceding Count IV includes a drawing or other illustration of an "I.U.D."
16. Relator alleges that the publication of said drawing or illustration in a legal service advertisement constitutes a violation of Disciplinary Rule 2-101(B).

COUNT VI

17. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
18. Disciplinary Rule 2-101(B) provides that legal service advertisements must be "presented in a dignified manner."
19. Relator alleges that the inclusion of a drawing or illustration or other representation of an I.U.D. in a legal service advertisement and the inclusion of comments which are directed at exciting action rather than informing the public does not constitute a "dignified manner" for informing a consumer of the availability of a practitioner to perform certain legal services, and that such material is detrimental to the public and serves no legitimate purpose which should or need be approved for legal service advertising and that such conduct constitutes a violation of Disciplinary Rules 2-101(A) and (B) and 1-102(A)(6).

COUNT VII

20. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
21. Relator asserts that prior to November, 1981, Respondent caused a certain advertisement to be published in newspapers, as a result of which Relator had discussions with Respondent pertaining to the existence of relevant rules of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio and as then were in effect and which pertained to the legal service advertisement which Respondent was then running.
22. Relator states that as a result of its correspondence and meetings with Respondent in regard to the prior advertisement, Respondent was completely informed of all prohibitions contained in Disciplinary Rule 2-101 and

other relevant sections of the Code of Professional Responsibility.
23. Relator alleges that Respondent thereafter had full knowledge of the relevant sections of the Code of Professional Responsibility and that the placement of the two advertisements now in question was done with the intent to violate Disciplinary Rule 2-101, all of which constitutes a violation of Gov. Rule V and the Oath of Office.

COUNT VIII

24. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
25. Disciplinary Rule 2-101(B) specifies the manner in which advertisements regarding contingent fee rates may be made:

(15) Contingent fee rates subject of DR-2106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.

26. Respondent's advertisement (Exhibit B) offered representation on a contingent basis. There is no statement about the method for computing such fee as required by DR 2-101(B)(15).
27. Relator asserts that the failure to include the qualification regarding computation of contingent fee is a violation of DR 2-101(B)(15) and a violation of DR 2-101(A) as a deceptive statement likely to mislead the public.

COUNT IX

28. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
29. In publishing Exhibit B, Respondent provided unsolicited advice that the reader should obtain legal counsel or take legal action if she had used the Dalkon Shield I.U.D., and if she had also had certain types of medical problems.
30. The advertisement further identified Respondent as a lawyer and stated that "our law firm is presently representing women on such cases."

31. Subsequent to the publication of the unsolicited advice (Exhibit B), Respondent accepted employment as attorney for Beverly J. Carr, who sought Respondent's representation after reading the advertisement.
32. Subsequent to the publication of the unsolicited advice (Exhibit B), Respondent accepted employment as attorney for Kaye M. Carver and Jerry E. Carver who consulted Respondent after reading the advertisement. Because of that advertisement, a suit was filed on the Carvers' behalf by Respondent, *Carver v. A.H. Robins Co., et al.*, Case No. C-2-82-537, Southern District of Ohio.
33. Disciplinary Rule 2-103(A) prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer.
34. Disciplinary Rule 2-104(A) prohibits an attorney from accepting employment after giving unsolicited advice to an individual that he obtain counsel or take legal action.
35. Relator alleges that Respondent's recommendation of himself for subsequent employment and the acceptance of employment in these circumstances constitute violations of DR 2-103(A) and DR 2-104(A).

/s/ Charles W. Kettlewell
Charles W. Kettlewell
Assistant Disciplinary Counsel
OFFICE OF DISCIPLINARY COUNSEL

360 S. Third St., Suite 109
Columbus, Ohio 43215
Telephone: (614) 461-0256
Counsel for Relator

/s/ Kathryn Haller
Kathryn Haller
Staff Counsel

OFFICE OF DISCIPLINARY COUNSEL
360 S. Third St., Suite 109
Columbus, Ohio 43215
Telephone: (614) 461-0256
Counsel for Relator

[Certificate, Rule V, Exhibits A & B, and Certificate of Service omitted in printing]

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Re:	:	
Complaint Against	:	
Philip Q. Zauderer,	:	
Respondent,	:	Case No. 454
	:	
Office of Disciplinary Counsel	:	
Relator.	:	

ANSWER OF RESPONDENT PHILIP Q. ZAUDERER

The Respondent, by his counsel, in answer to the Relator's Amended Complaint:

1. Admits that Gov. Rule V purports to authorize the Relator to file the complaint.

2. Admits that the Respondent was admitted to the practice of law in Ohio on October 17, 1964 and admits that he is subject to the Rules for Government of the Bar of Ohio only to the extent that such rules are pursuant to and do not abridge or are in conformity with the provisions of the Ohio Constitution and the Constitution of the United States of America.

3. Admits that he caused to be published on November 25, 1981, the advertisement attached as "Exhibit A" to Relator's Amended Complaint.

4. Denies the allegations of paragraph four of Relator's Amended Complaint.

5. Restates, in response to paragraph five of the Relator's Amended Complaint, his responses to paragraphs one through four of the Amended Complaint, as set forth in this Answer.

6. Admits that Disciplinary Rule 2-106(C) prohibits a lawyer in Ohio from "entering into an arrangement for," or "charging" or "collecting" a "contingent fee for representing a defendant in a criminal case."

7. Denies that the Respondent advertised himself "as being available to perform legal service under conditions which are

not permitted," and specifically denies that the advertisement in qustion (attached as "Exhibit A" to the Relator's Amended Complaint) was "false, fraudulent, misleadng and deceptive to the public."

8. Restates, in response to paragraph eight of the Relator's Amended Complaint, his responses to paragraphs one through seven of the Amended Complaint, as set forth in this Answer.

9. Admits, in response to paragraph nine of the Relator's Amended Complaint, that Disciplinary Rule 2-101(B) purports to regulate the content of advertisements published or broadcast by lawyers in Ohio.

10. Admits, in response to paragraph ten of Relator's Complaint, that on or about March 11, 1982, the Respondent caused to be published in the *Columbus Citizen-Journal* the advertisement, a copy of which is attached to the Relator's Amended Complaint as "Exhibit B."

11. Admits the allegations contained in paragraph 11 of Relator's Amended Complaint.

12. Admits that the content of the said advertisement ("Exhibit B") may, in part, technically violate the blanket prohibition of Disciplinary Rule 2-101(B) against the use of any information not specifically authorized by that Rule.

13. Restates, in response to paragraph 13 of the Relator's Amended Complaint, his responses to paragraphs 1 through 12 of the Amended Complaint, as set forth in this Answer.

14. Admits the allegations of paragraph 14 of Relator's Amended Complaint.

15. Admits the allegations of paragraph 15 of the Relator's Amended Complaint, and specifically states that the drawing or illustration is that of a Dalkon Shield, an I.U.D. manufactured and distributed by the A.H. Robins Company.

16. Admits, in response to paragraph 16 of the Relator's amended complaint, that the publication of the drawing or illustration may technically violate the blanket prohibition of Disciplinary Rule 2-101(B) against the use of such drawings or illustrations.

17. Restates, in response to paragraph 17 of the Relator's Complaint, his responses to paragraphs 1 through 16 of the Amended Complaint, as set forth in this answer.

18. Admits the allegations of paragraph 18 of the Relator's Amended Complaint.

19. Denies the allegations of paragraph 19 of the Relator's Amended Complaint, and specifically denies that the advertisement in question is directed at "exciting action" rather than "informing the public."

20. Restates, in response to paragraph 20 of the Relator's Amended Complaint, his responses to paragraphs 1 through 19 of the Amended Complaint as set forth in this Answer.

21. Admits the allegations of paragraph 21 of the Relator's Amended Complaint.

22. Admits the allegations of paragraph 22 of the Relator's Amended Complaint with the exception of the allegation that he was informed of all "other relevant sections of the Code of Professional Responsibility."

23. Admits, in response to paragraph 23 of the Relator's Complaint, that the Respondent was familiar with Disciplinary Rule 2-101 relating to advertising, but states that the (Dalkon Shield) advertisement (a copy of which is attached to the Relator's Amended Complaint as Exhibit B) was published only after the United States Supreme Court issued its landmark decision concerning lawyer advertising on January 25, 1982 in *R.M.J.*, 102 S. Ct. 929 (1982), which was also published in the *Ohio State Bar Association Report,* Vol. 55, No. 8, February 22, 1982, at pages 309-319, and after a conference on March 5, 1982 with Judge Stern of the Relator who indicated that there was an apparent conflict between Ohio's version of DR 2-101 and the permissible scope of regulation under *R.M.J.*, and that his office (Relator) would follow the law of the land on the subject of advertising (as set forth by the United States Supreme Court).

24. Restates, in response to paragraph 24 of the Relator's Amended Complaint, his responses to paragraphs 1 through 23 of the Amended Complaint as set forth in this answer.

25. Admits, in response to paragraph 25 of the Relator's Amended Complaint, that Disciplinary Rule 2-101(B), in its purported regulation of the "content" of advertisements published or broadcast by lawyers in Ohio, provides in subsection (15) that the following information may be published or broadcast:

> Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.

26. Denies, in response to paragraph 26 of the Relator's Amended Complaint, that the advertisement (Exhibit B) "offered representation on a contingent fee basis," or that any "statement about the method for computing" a contingent fee was required by DR 2-101(B) to be included in the advertisement.

27. Denies the allegations of paragraph 26 of the Relator's Amended Complaint.

28. Restates, in response to paragraph 28 of the Relator's Amended Complaint, his responses to paragraphs one through 27 of the Relator's Amended Complaint, as set forth in this Answer.

29. Denies the allegations of paragraph 29 of the Relator's Amended Complaint.

30. Admits, in response to paragraph 30 of the Relator's Amended Complaint, that the advertisement (Exhibit B) stated, in part, that "our law firm is presently representing women on such cases."

31. Admits, in response to paragraph 31 of the Relator's Amended Complaint that he "accepted employment as attorney for Beverly J. Carr who sought Respondent's representation after reading the advertisement," but specifically denied that the publication of the advertisement (Exhibit B) constituted "unsolicited advice."

32. Admits, in response to paragraph 32 of the Relator's Amended Complaint, that he "accepted employment as attorney for Kaye M. Carver and Jerry E. Carver who consulted

Respondent after reading the advertisement, and that he filed *Carver v. A. H. Robins Co., et al.*, Case No. C-2-82-537, Southern District of Ohio, on behalf of the Carvers.

33. Admits the allegations of paragraph 33 of the Relator's Amended Complaint, but only to the extent that the "prohibition" imposed by DR 2-103(A) is pursuant to or in conformity with and does not abridge any provision of the Ohio Constitution and the Constitution of the United States of America, or applicable law.

34. Admits, except as otherwise provided in DR 2-104(A)(1) through (5), the allegations of paragraph 34 of the Relator's Amended Complaint, but only to the extent that the "prohibition" imposed by DR 2-104(A) is pursuant to or in conformity with and does not abridge any provisions of the Ohio Constitution and the Constitution of the United States of America, or applicable law.

35. Denies, in response to paragraph 35 of the Relator's Amended Complaint, that he recommended himself for subsequent employment, or that his representation of Beverly J. Carr or the Carvers constitutes a violation of either DR 2-103(A) or DR 2-104(A).

36. Respondent denies each and every allegation contained in the Relator's Amended Complaint and not specifically admitted.

FIRST DEFENSE

[Violation of Respondent's Federal Constitutional Rights]

37. Disciplinary Rule 2-101 (B) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the Respondent's rights which are guaranteed by the First, Ninth and Fourteenth Amendments to the Constitution of the United States of America.

SECOND DEFENSE

[Violation of Respondent's State Constitutional Rights]

38. Disciplinary Rule 2-101 (B) is unconstitutional on its face and as applied in this case, and impermissibly restricts, infringes upon and violates the Respondent's rights which are

guaranteed by Article I, Section 11, Article I, Section 20, and Article I, Section 1 of the Ohio Constitution.

THIRD DEFENSE

[Violation of the Public's Federal Constitutional Rights]

39. Disciplinary Rule 2-101(B) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights under the First, Ninth and Fourteenth Amendments to the Constitution of the United States of America including, but not limited to: (1) the right of persons to receive information; (2) the right of access and redress in the courts; (3) the right to litigate; and (4) the right of freedom of association.

FOURTH DEFENSE

[Violation of the Public's State Constitutional Rights]

40. Disciplinary Rule 2-101(B) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights guaranteed by the Ohio Constitution including, but not limited to: (1) the right of "seeking and obtaining happiness and safety (guaranteed by Article I, Section 1); (2) the right to receive information (guaranteed by Article I Section ll); (3) the right of freedom of association and the right "to consult for their common good" (guaranteed by Article I, Section 3); and (4) the right to litigate and the right of access to the courts (guaranteed by Article I, Section 16 and Article I, Section 20).

FIFTH DEFENSE

[Vagueness]

41. With respect to Count VI of the Relator's Amended Complaint, the term "dignified manner" contained in the language of DR 2-101(B) which states, in part, that information disclosed must be "presented in a dignified manner" is unconstitutionally vague, and contrary to the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Ohio Constitution.

SIXTH DEFENSE

[Canon 2]

42. The Respondent's actions were in full compliance with and pursuant to Canon 2 of the Code of Professional Responsibility which provides that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available," and EC 2-1 which provides that:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

SEVENTH DEFENSE

[Estoppel]

43. With respect to Counts IV through VII of the Relator's Complaint, the Relator is estopped from prosecuting and seeking the discipline of the Respondent on such counts or asserting such counts since the Respondent caused the Dalkon Shield advertisement (Exhibit B to Relator's complaint) to be published only after the United States Supreme Court issued its January 25, 1982 decision in *R.M.J.*, 102 S. Ct. 929 (1982), and a meeting was had with the Relator who advised the Respondent that it would follow the "law of the land" on lawyer advertising as set forth by United States Supreme Court, notwithstanding the fact that Ohio's Disciplinary Rule 2-101(B) apparently conflicts with the scope of regulation deemed permissible by the Supreme Court in *R.M.J.*

44. Respondent relief [sic] on this opinion in causing the advertisement in question to be published and would not have published the advertisement had he not been so informed by Relator, and had he not believed the advertisement was entirely proper under the language of *R.M.J.* and the law of the land.

EIGHTH DEFENSE

[Acknowledgment of No Violation of DR 2-101(A)]

45. Counts VI and VIII of the Relator's Amended Complaint, in part, allege a violation of Dr 2-101 (A) which provides that:

> A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

46. In paragraph 30 of the "Stipulation of Fact Between Relator and Respondent", filed September 30 [sic], 1982, the Respondent admitted and acknowledged that:

> "The Dalkon Shield advertisement published by the Respondent does *not* contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."

NINTH DEFENSE

47. Rule V, Section (4) of the Supreme Court Rules for The Government Of the Ohio Bar provides that:

> The investigation of complaints shall be concluded within sixty days from the receipt of the complaint. *A decision as to the disposition of such complaint shall be made within thirty days thereafter.*
>
> [Emphasis Added]

48. Despite the fact no complaint with respect to the advertisement which is the subject of Counts II and III of the Relator's Complaint, was received after December 4, 1981, a decision as to the disposition of such complaint(s) was *not* made within 30 days, and the Relator's complaint was not filed until more than *eight months later.*

49. The Relator is bound by Rule V and may not now maintain its prosecution based on Counts II and III.

50. In the Relator's Amended Complaint, Counts VIII and IX were tacked on to those contained in the original complaint. The new counts were not made in accordance with

Rule V, Section (4), and the Relator may not maintain its prosecution based on these Counts.

TENTH DEFENSE

51. Count IX of Relator's Amended Complaint alleges, in effect, that the Respondent engaged in unproper "solicitation" by causing the Dalkon Shield advertisement (Exhibit B) to be published.

52. DR 2-103(A) does not, and was not intended to properly apply to newspaper advertisements, such as the Dalkon Shield advertisement, where the potential "evils" traditionally associated with in-person solicitation, such as overreaching or undue influence, are not present.

ELEVENTH DEFENSE

[Violation of Respondent's Constitutional Rights]

53. Even assuming, *arguendo,* that Respondent's publication of the Dalkon Shield advertisement (Exhibit B) constituted a "recommendation" of his employment "to a non-lawyer who has not sought his advice regarding employment of a lawyer" (which the Respondent specifically denies), Disciplinary Rule 2-103 (A) is unconstitutional on its face and as applied, for it permissibly restricts, impedes, infringes upon and violates the Respondent's rights which are guaranteed by the First and Fourteenth Amendments to the Constitution of the United States of America, and by Article I, Section 11, Article I, Section 20, and Article I, Section 1 of the Ohio Constitution.

TWELVTH DEFENSE

[Violation of the Public's Constitutional Rights]

54. Disciplinary Rule 2-103(A) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights under the First and Fourteenth Amendments to the Constitution of the United States of America including, but not limited to: (1) the right of persons to receive information; (2) the right of access and redress in the courts; (3) the right to litigate; and (4) the right of freedom of association; and it impermissibly restricts, impedes, infringes upon and violates the public's

rights guaranteed by the Ohio Constitution including, but not limited to: (1) the right of "seeking and obtaining happiness and safety" (guaranteed by Article I, Section 1); (2) the right to receive information (guaranteed by Article I, Section 11); (3) the right of freedom of association and the right "to consult for their common good" (guaranteed by Article I, Section 3); and (4) the right to litigate and the right of access to the courts (guaranteed by Article I, Section 16 and Article I, Section 20).

THIRTEENTH DEFENSE

[Violation of the Respondent's Federal Constitutional Rights]

54.* Even assuming, *arguendo,* that by publishing the Dalkon Shield advertisement (Exhibit B) the Respondent thereby gave "unsolicited *advice* to a layman that he should obtain counsel or take legal action", (which the Respondent specifically denies), Disciplinary Rule 2-104 on its face, and as applied, is unconstitutional, for it impermissibly restricts, impedes, infringes upon and violates the Respondent's rights guaranteed by the First, Ninth and Fourteenth Amendments of the Constitution of the United States of America, including, but not limited to: (1) the right to liberty; (2) the right of freedom of association; (3) the right of freedom of speech and press.

FOURTEENTH DEFENSE

[Violation of the Respondent's State Constitutional Rights]

55. Even assuming, *arguendo,* that by publishing the Dalkon Shield advertisement (Exhibit B), the Respondent thereby gave "unsolicited advice to a layman that he should obtain counsel or take legal action", (which the Respondent specifically denies), Disciplinary Rule 2-104 on its face and as applied, is unconstitutional, for it impermissibly restricts, impedes, infringes upon and violates the Respondent's rights guaranteed by Article I, Section 1, Article I, Section 2, and Article I, Sction 20 of the Ohio Constitution.

* Two paragraphs bear No. 54 in original answer.

FIFTEENTH DEFENSE

[Violation of the Public's Federal Constitutional Rights]

56. Disciplinary Rule 2-104 is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights under the First, Ninth and Fourteenth Amendments to the Constitution of the United States of America including, but not limited to: (1) the right of access and redress in the courts; (2) the right to litigate; and (3) the right of freedom of association.

SIXTEENTH DEFENSE

[Violation of the Public's State Constitutional Rights]

57. Disciplinary Rule 2-104 is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights guaranteed by the Ohio Constitution including, but not limited to: (1) the right of "seeking and obtaining happiness and safety" (guaranteed by Article I, Section 1); (2) the right of freedom of association and the right "to consult for their common good" (guaranteed by Article I, Section 3); and (3) the right to litigate and the right of access to the courts (guaranteed by Aticle I, Section 16 and Article I, Section 20).

SEVENTEENTH DEFENSE

[Failure to State a Violation - DR 2-101(B)]

58. In view of the fact that Disciplinary Rule 2-101(B) is unconstitutional on its face and as applied, Counts II, and IV through VIII fail to state a claim or violation upon which "relief" can be granted to the Relator.

EIGHTEENTH DEFENSE

[Failure to State a Violation - DR 2-103, DR 2-104]

59. In view of the fact that Disciplinary Rules 2-103 and 2-104, as applied to the facts of this case, are unconstitutional, Count VIII fails to state a claim or violation upon which "relief" can be granted to the Relator.

NINETEENTH DEFENSE

[Oath of Office]

60. As an Ohio lawyer, the Respondent took a sworn Oath of office, required by the Supreme Court of Ohio, stating in pertinent part:

I will support the Constitution of the United States and the Constitution of the State of Ohio.

* * * * * * * * *

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice, So Help Me God.

61. The Respondent's action in publishing the Dalkon Shield advertisement was in accordance with the Respondent's duty under his oath of office.

62. To the extent there is a conflict between the disciplinary rules in question [which have not been modified since the United States Supreme Court's ruling in *Matter of R.M.J.*, 102 S.Ct. 929 (1982)], and the Respondent's affirmative obligations imposed by the oath of office, the obligations of the oath of office govern.

63. Any prosecution or discipline of the Respondent for his action in fulfilling the sworn duty imposed upon him by the oath of office is improper and inappropriate.

TWENTIETH DEFENSE

[Article IV, Ohio Constitution]

64. Article IV, of the Ohio Constitution does not authorize the Supreme Court of Ohio to issue or adopt Rules prescribing or limiting the actual content of advertisements by lawyers.

TWENTY-FIRST DEFENSE

[Invalidity of Disciplinary Process]

65. Ohio's disciplinary process under Rule V of the Rules For The Government Of The Bar violates the Respondent's right of due process, guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and by Article I, Sections 1, 16 and 20 of the Ohio Constitution.

66. Under this process the Supreme Court promulgates rules, acts to prosecute and enforce the rules (through its agents and employees of the Office of Disciplinary Counsel of the Supreme Court of Ohio), and sits as to the fact finder and interprets and applies the rules, even when its rules are attacked as being unconstitutional.

TWENTY-SECOND DEFENSE

67. Ohio's disciplinary process under Rule V violates the guarantee of a "Republican form of government" secured by Article IV, Section 4 of the Constitution of the United States of America, and the fundamental principle of separation of powers.

WHEREFORE, Respondent prays that the Relator's complaint be dismissed.

Respectfully submitted,
/s/ David K. Frank

DAVID K. FRANK
(FRA-04)
SCHWENKER, CLOUD & TUDOR
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing answer was served by first class U.S. mail, postage prepaid, upon Charles W. Kettlewell, and Kathryn Haller, 360 South Third Street, Suite 109, Columbus, Ohio 43215, counsel for Relator, on this 14th day of January, 1982.

David K. Frank
ATTORNEY AT LAW

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:	:	
Complaint Against:	:	
Philip Q. Zauderer,	:	Case No. 454
Respondent,		
	:	
Disciplinary Counsel,	:	
Relator.	:	

SECOND STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT

In supplementation to the Stipulation of Fact filed herein on September 13, 1982, the Relator and Respondent and their counsel, without the necessity for evidence, hereby stipulate and agree that the following facts are true and can and should be treated as such:

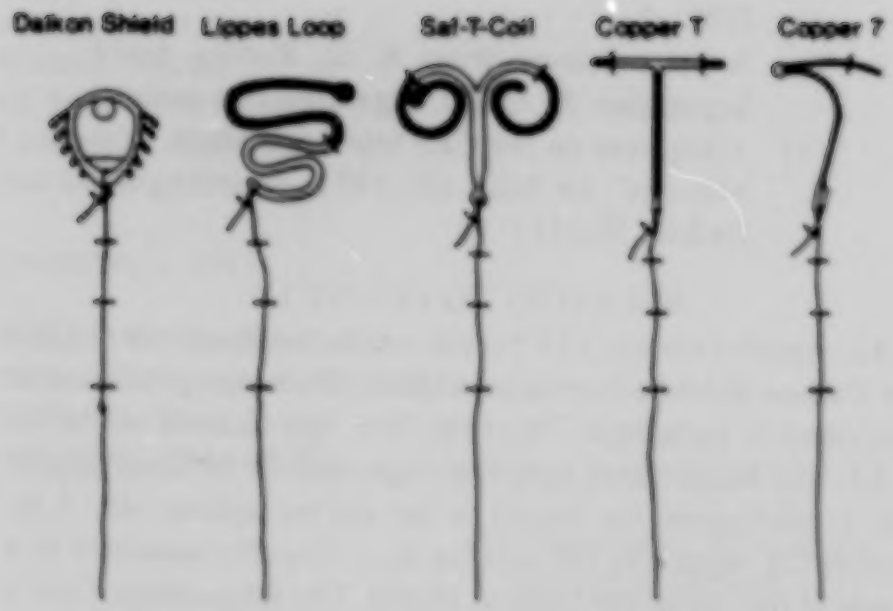
RELATING TO COUNTS IV, V, VI, IX

Dalkon Shield Advertisement

35. The graphic illustration contained in the advertisement attached to the Relator's Amended Complaint as Exhibit B is an illustration of the Dalkon Shield, an intrauterine contraceptive device (IUD) manufactured and marketed by the A. H. Robins Co.

36. During the time period that the Dalkon Shield was being marketed in the United States (June 13, 1970 through June 28, 1974), and since June 28, 1974, other brands or types of intrauterine contraceptive devices (IUD's) were being or have been sold or marketed in the United States.

37. The following diagram taken from an article entitled "The Dalkon Shield Controversy, Structural and Bacteriological Studies of IUD Tails," *JAMA*, February 17, 1975, Vol. 231, No. 7, at page 713 (and attached to the Brief in Support of Respondent's Motion to Dismiss filed herein) illustrates the principal types of IUD's marketed in the United States.



38. Relator knows of no client of the Respondent who has made a complaint about the publication of this Dalkon Shield advertisement.

39. The investigation regarding the Dalkon Shield advertisement was initiated after communications from other members of the Ohio Bar and the Ohio Osteopathic Association about the advertisement.

40. After the Respondent published the Dalkon Shield advertisement, Columbus counsel for A. H. Robins Co. telephoned the Relator regarding that advertisement.

41. In addition to technical, medical and scientific journals and reports, at least the following information has been made available regarding the Dalkon Shield:

(a) Press releases and newspaper articles in 1974 regarding the decision to remove the Dalkon Shield IUD from the market (Exhibit 3-1 and 3-2).

(b) A notice in 1980 to obstetricians and gynecologists nationwide from A. H. Robins

recommending actions to be taken on behalf of patients who still used the Dalkon Shield IUD.

(c) A press release from A. H. Robins dated September 25, 1980, regarding this notice.

(d) A segment on the CBS television show, "60 Minutes" on April 19, 1981, regarding the Dalkon Shield IUD.

RELATING TO COUNT IX

42. Approximately 235 people contacted Respondent after the Dalkon Shield advertisement (Exhibit B) was published as described in paragraph 29 of the first Stipulations of Fact.

43. The Respondent agreed to represent 95 of these people (on a contingent fee basis) in an action against the A.H. Robins Co. regarding the injuries they allegedly sustained as a result of the use of the Dalkon Shield. The Respondent filed a federal lawsuit on behalf of each such person he agreed to represent.

44. Respondent has also agreed to represent (on a contingent fee basis) 11 people who contacted him following publication of the Dalkon Shield advertisement regarding injuries they allegedly sustained as to the result of the use of another type of IUD.

APPROVED:

/s/ David K. Frank
David K. Frank
8 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 338-8787
Counsel for Respondent

/s/ Kathryn Haller
Kathryn Haller, Assistant
DisciplinaryCounsel

Angelo J. Gagliardo
Disciplinary Counsel
175 South Third Street
Columbus, Ohio 43215
Telephone: (614) 461-0256
Counsel for Relator

[Press Releases, Exhibits 3-1 and 3-2, omitted in printing.]

EXHIBIT C

Philip Q. Zauderer
Attorney at Law
Whittier Square
52 West Whittier Street
Columbus, Ohio 43206
614 445-8416

December 1, 1981

Richard W. Kettlewell, Esq.
Office of Disciplinary Counsel
360 South Third Street
Columbus, Ohio 43215

Re: Newspaper Advertising
Drunken Driving

Dear Mr. Kettlewell:

I am writing this letter in response to our telephone conversation of December 1, 1981, in which you requested a letter from me setting forth my position in regard to the captioned advertisement.

The wording of this ad was illconceived, in that it is without question in violation of the Rule prohibiting contingency fees in criminal cases. There was no intent on my part to disregard this Rule, I just simply forgot the existence of such a Rule inasmuch as the last time I read it I was in law school, and that has been some twenty years ago.

Since becoming aware of the fact that this ad is contrary to the Canons of Professional Ethics, I immediately withdrew it and no criminal cases were accepted by me on a contingency fee basis, nor have any such cases been accepted on this basis in the past. The two persons who responded to this ad were advised that their cases could not be handled as set out in my advertisement and they were referred to other counsel.

I have now thoroughly familiarized myself with all the Rules and Canons of Professional Ethics applying to advertising and solicitation of clients in criminal cases with regard to fees, and I can assure you that there is no danger of my making any such mistakes in the future.

Respectfully yours,
/s/ Philip Q. Zauderer
Philip Q. Zauderer

PQZ/jn

EDITOR'S NOTE

PAGES 45 thru 51 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

A careless roadrunner
named Fred
Slipped under a light that was red.
He thought he'd go free
With a "No Contest" plea,
But now he's a jailbird instead.

"No Contest" is only an admission of facts charged against you. But even in traffic court, "No Contest" can land you in jail as fast as "Guilty."
Yet, in certain instances, pleading "No Contest" is the smartest thing you can do. So how do you plead?
Call your lawyer. Sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

Respondent's Exhibit 4

A carefree old spirit named Bill
Passed on without writing a will.
His kin battled on
'Til his fortune was gone,
Leaving nothing but
dust in the till.



Not having a will could leave your loved ones up to their necks in costly legal hassles. Even if you're single or young, the effects could be devastating.

And more than your possessions are at stake. Because probate court may have different ideas than you do about who will raise your children. Or who will get your property.

If you don't have a will, call your lawyer.* Writing a will can be a simple matter and in most cases costs very little. But most importantly, it protects the ones you love.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service in Ohio: 1-800-282-0600

Respondent's Exhibit 6

Benita found bats in her attic,
And gave her ol' landlord
some static.
"Forget it!" he yelled,
So her rent she withheld.
Her eviction was quite automatic.



Holding back your rent is not the way to get your landlord to make necessary repairs. One thing you can do, however, is deposit your rent with the Clerk of your Municipal or County Court.

The court will hold your rent until your differences are resolved. This will also protect you from eviction if you are acting in good faith.

There is no filing fee, and you don't need a lawyer. But your lawyer* can be a big help. Besides, sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service in the Cincinnati area call 381-8200 Elsewhere in Ohio: 1-800-282-0600

Respondent's Exhibit 5

Hank's housekeeper slipped accidentally -And was hospitalized consequently. When the hospital bill Came to Hank he got ill. Did he need Worker's Comp? Evidently.



Ohio law requires that you have Worker's Compensation coverage if you pay more than $160 total wages in any calendar quarter.

That includes your babysitter, the kid who cuts your grass, the college student who paints your house. What's more, your homeowner's insurance may not protect you.

Should you be covered? If you're not sure, call your lawyer.* Sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service. In the Cincinnati area call 381-8359. Elsewhere in Ohio: 1-800-282-6500.

Respondent's Exhibit 8

Jill signed for a sea-cruise one day, When they promised her wind, salt and spray. But a line of fine print Read, "You'll love your new stint As our figurehead pointing the way."



New laws are doing more these days to protect you as a consumer. But you still can get yourself in over your head by not reading and understanding what you sign.

For example, the new Home Solicitation Law gives you three business days to cancel any contract you sign as a result of door-to-door or telephone solicitation. But unless you understand the terms of the contract the law does you little good.

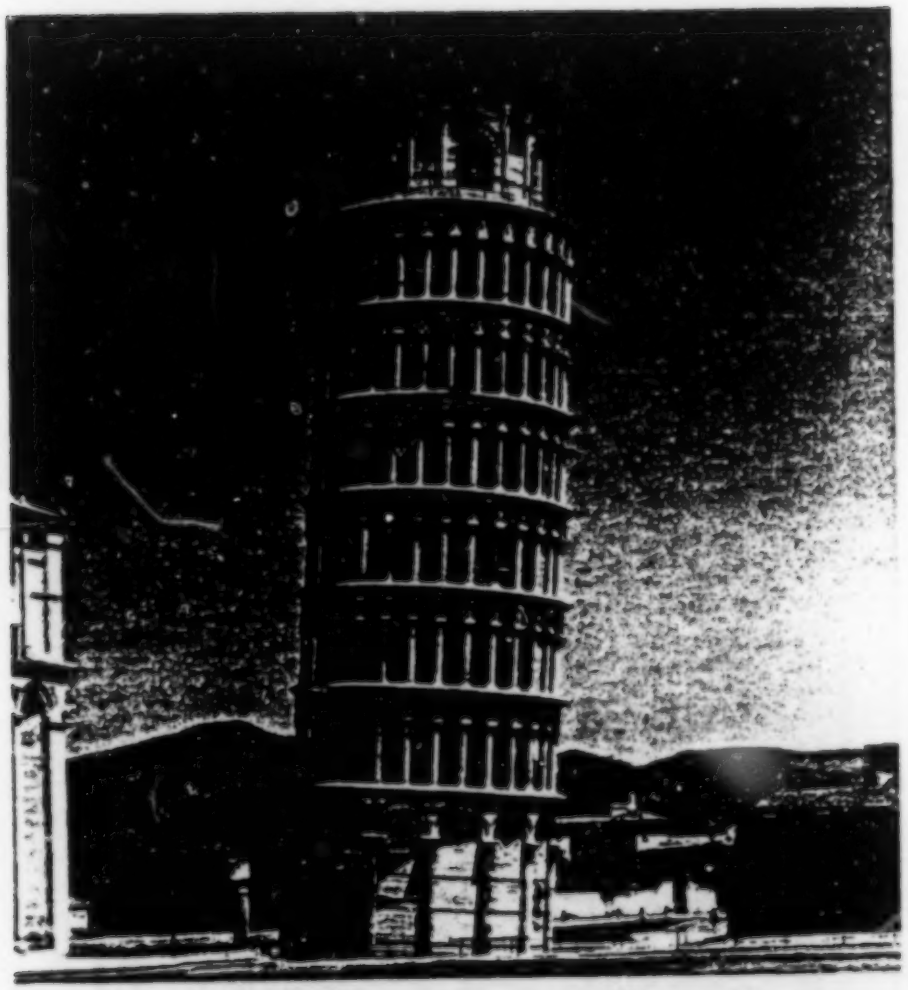
If you don't understand a contract, don't sign. Call your lawyer.* Sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service. In the Cincinnati area call 381-8359. Elsewhere in Ohio: 1-800-282-6500.

Respondent's Exhibit 7



Bet the purchase agreement never mentioned the condition of the house.

A house may seem ideal in appearance and price. But if you sign a contract with no protection written for you, your dream may fall on its face.

So how do you prevent such a thing from happening to you? It's simple. See a lawyer *before* you sign an offer to purchase. He can make sure that the papers fully protect you against wasting your hard-earned money. His services cost far less to keep you out of hot water than to get you out once you're in.

So, before you sign your life or your life's savings away, bring the contract to a lawyer. It probably will cost less than you think.

ohio state bar association

See your lawyer. If you don't know a lawyer, call the Lawyer Referral Service in Ohio: Call Toll Free 1-800-282-6500.

Respondent's Exhibit 9



If you don't have a will, guess who could wind up with the kids.

Uncle Harry.

In fact, if you don't have a will and something happens to both you and your spouse, Uncle Harry could wind up raising the kids and controlling your entire estate. Because, without a will, you don't have any say after the hereafter.

Since drafting a will is much too delicate a task to handle alone, you should first see your lawyer. He's the only person professionally qualified to help you avoid the numerous pitfalls and to offer sound advice on your particular situation. His service costs less than you might think, and it's a small price to pay for the future of your family.

ohio state bar association

See your lawyer. If you don't know a lawyer, call the Lawyer Referral Service in Ohio: 1-800-282-6500.

Respondent's Exhibit 10

Office-Supreme Court, U.S.
FILED
NOV 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2166

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLANT

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank
Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

58 pp

QUESTIONS PRESENTED*

1. May a state, consistent with the First Amendment, discipline a lawyer under its anti-solicitation rules for publishing a truthful newspaper advertisement informing women injured by an allegedly defective medical device that it may not be too late to bring suit, offering to represent them in such litigation, and agreeing to represent approximately 100 women who contacted him in response to the ad?

2. May a state, consistent with the First Amendment, discipline a lawyer for placing an advertisement which contains an accurate drawing of an allegedly defective medical device and which states that the lawyer is available to accept cases involving that device on a contingent fee basis, on the grounds that (a) the state considers any illustration other than a picture of a lawyer or a portrayal of the scales of justice to be inherently misleading, and (b) the state contends that, in every advertisement for contingent fee representation, a lawyer must state the specific percentages to be charged and describe the manner in which costs will be handled?

3. May a state, consistent with the Due Process Clause of the Fourteenth Amendment, discipline a lawyer on the ground that he placed a misleading advertisement, where the state (a) completely changes its theory of why the ad is misleading after the trial has been concluded, and (b) bases its finding that the ad was misleading on "general knowledge which can be determined from Municipal Court reports to the [Ohio] Supreme Court," where the reports were neither introduced into evidence nor previously mentioned in the proceedings?

---

* There are no parties to this proceeding other than those listed in the caption. The Ohio Newspaper Association, the Dispatch Printing Company, and the American Civil Liberties Union Foundation of Ohio, Inc. appeared as amicus curiae in support of appellant in the Supreme Court of Ohio.

CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES ..... (iv)

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 3

STATEMENT OF THE CASE 4

1. Statement of Facts 4
2. The Charges 6
3. The Evidence 10
4. The Board Decision 15
5. The Decision of the Supreme Court of Ohio 18

SUMMARY OF ARGUMENT 19

ARGUMENT 23

I. THE FIRST AMENDMENT PRECLUDES THE OHIO SUPREME COURT FROM DISCIPLINING APPELLANT FOR PUBLISHING HIS DALKON SHIELD AD. 23

Introduction 23

A. The Findings of Misconduct Based on the Anti-Solicitation Charges Violate the First Amendment 24

B. The Content-Based Findings of Misconduct Based On The Inclusion Of The Drawing Of The Dalkon Shield And The Failure To Include The Details Of Appellant's Contingent Fee Agreement Violate The First Amendment 33

1. The Dalkon Shield Illustration 33
2. The Affirmative Disclosure Requirements for Contingent Fees 37

II. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE CHANGED THE BASIS FOR OBJECTING TO HIS DRUNK DRIVING AD. 43

CONCLUSION 47

ADDENDUM

TABLE OF AUTHORITIES

Cases: Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ..... 4, *passim*

Bigelow v. Virginia, 421 U.S. 809 (1975) 23

Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875 (1983) 26, 28, 32

Bowman Transportation Inc. v. Arkansas - Best Freight System, Inc., 419 U.S. 281 (1974) 45

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 46

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) ..... 19, *passim*

Cole v. Arkansas, 333 U.S. 196 (1948) 22, 45

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 28

DeJonge v. Oregon, 299 U.S. 353 (1937) 45

Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980) 29

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 22, 35, 41

Page

Friedman v. Rogers, 440 U.S. 1 (1979) 40

Greene v. McElroy, 360 U.S. 474 (1959) 46

In re Primus, 436 U.S. 412 (1978) 24, 28

In re R.M.J., 455 U.S. 191 (1982) ..... 4, *passim*

In re Ruffalo, 390 U.S. 544 (1968) 22, 44-45

Linmark Associates Inc. v. Willingboro, 431 U.S. 85 (1977) 28

Matter of Discipline of Appert & Pyle, 315 N.W.2d 204 (Minn. 1981) 4, 15, 25, 29, 42

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981) 28

Morgan v. United States, 304 U.S. 1 (1938) 22, 45

NAACP v. Button, 371 U.S. 415 (1963) 25

Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio 301 U.S. 292 (1937) 46

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 18, 19, 23, 27, 28

Regan v. Time, Inc., 104 S. Ct. 3262 (1984) 33

Richardson v. Perales, 402 U.S. 389 (1971) 46

Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. 880 (E.D.Pa. 1984) 24

State v. Schaffer, 649 P.2d 355 (Okl. 1982) 30

Thompson v. Louisville, 362 U.S. 199 (1960) 46

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 31

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 20, 23, 29

Wolff v. McDonnell, 418 U.S. 539 (1974) 45

Zablocki v. Redhail, 434 U.S. 374 (1978) 41

Constitutional Provisions, Statutes, and Rules:

United States Constitution
First Amendment ..... 3, *passim*
Fourteenth Amendment ..... 3, *passim*

28 U.S.C. § 1257(2) 2
28 U.S.C. § 1257(3) 2
28 U.S.C. § 2403(b) 2

Rules, United States Supreme Court
Rule 28.4(c) 2

Rules of the Supreme Court of Ohio for the Government of the Ohio Bar
Disciplinary Rule 2-101(A) ..... 2, *passim*
Disciplinary Rule 2-101(B) ..... 3, *passim*
Disciplinary Rule 2-101(B)(15) ..... 8, *passim*
Disciplinary Rule 2-101(B)(16) 40
Disciplinary Rule 2-101(B)(17) 40
Disciplinary Rule 2-102(A)(6) 7
Disciplinary Rule 2-103(A) ..... 3, *passim*
Disciplinary Rule 2-104(A) ..... 3, *passim*
Disciplinary Rule 2-106(C) 6, 8, 15, 38, 43, 44

Practice Rule V 7, 18

Other Authorities:

Hazard, G., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084 (1983) 29

Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 4016 (1977) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-2166

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio issued on April 4, 1984, is set forth in Appendix A to the Jurisdictional Statement (App. 1a-7a) and is reported at 10 Ohio St. 3d 44, 10 OBR 308, and 461 N.E. 2d 883. The Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the "Board"), adopted on June 24, 1983, are set forth in Appendix B to the Jurisdictional Statement (App. 8a-21a) and are not officially reported.

JURISDICTION OF THIS COURT

This is an appeal from a final order disciplining a lawyer for placing two newspaper advertisements. The first two questions presented challenge the validity of three Rules for the Government of the Bar of Ohio, issued by the Supreme Court of Ohio. Appellant contends that, as applied to one of his two ads, the Rules are invalid under the First Amendment to the United States Constitution. The order of the Ohio Supreme Court imposing a public reprimand on appellant was entered on April 4, 1984 (App. C, 22a-23a) and a notice of appeal was filed on May 31, 1984, in the Supreme Court of Ohio (App. D, 24a-26a). Because 28 U.S.C. § 2403(b) may be applicable to this appeal, copies of appellant's notice of appeal and Jurisdictional Statement were served on the Attorney General of Ohio. *See* Rule 28.4(c) of the Rules of this Court. Jurisdiction in this Court is based on 28 U.S.C. § 1257(2).

The third question presented relates to the Supreme Court of Ohio's finding, also entered on April 4, 1984, that appellant's other ad violated Disciplinary Rule 2-101(A). Appellant alleges that this finding of misconduct violates the procedural due process protections of the Fourteenth Amendment. Because appellant does not challenge the validity of Rule 2-101(A), for that claim alone this Court would have only certiorari jurisdiction under 28 U.S.C. § 1257(3). However, because this Court has appellate jurisdiction under 28 U.S.C. § 1257(2) with respect to questions 1 and 2, it has appellate jurisdiction over the third question as well. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 4016 (1977) and cases cited therein.

This appeal was docketed in this Court on July 2, 1984, and on October 1, 1984, this Court noted probable jurisdiction.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States provides in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ....

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property without due process of law ....

The pertinent provisions of Rule V of the Rules for the Government of the Bar of Ohio, DR 2-101(A), DR 2-101(B), DR 2-103(A), and DR 2-104(A), are set forth in Appendix E to the Jurisdictional Statement (App. 27a-29a).

STATEMENT OF THE CASE

1. Statement of Facts

Appellant Philip Q. Zauderer has been a member of the Ohio Bar since 1964. His office is located in Columbus, Ohio, where he engages principally in plaintiffs' personal injury and product liability work. Prior to this proceeding he had never been the subject of a disciplinary proceeding.

This appeal challenges the public reprimand imposed on appellant for placing two different newspaper advertisements. Because the principal focus of the disciplinary proceeding was on the ad which was placed second in time, and because the charges relating to the other ad apparently would not have been brought but for appellant's second ad, we will first discuss the second ad, which is the subject of questions 1 and 2.

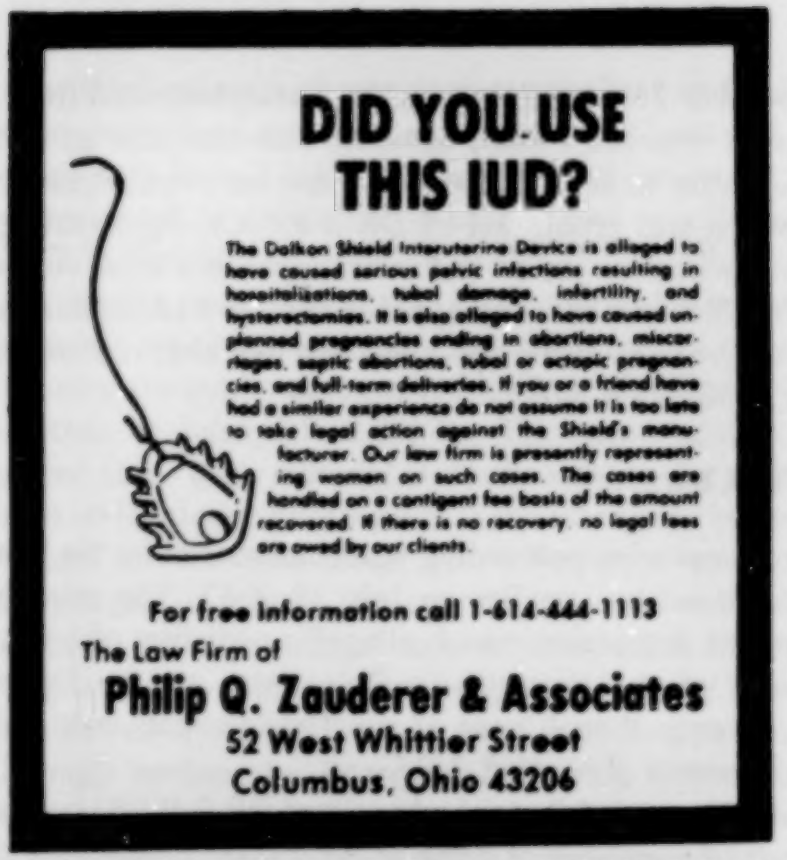
Beginning in May, 1981, appellant wrote to and met with members of the staff of the appellee Office of Disciplinary Counsel of the Supreme Court of Ohio, which is designated by that Court to enforce the attorney disciplinary rules in Rule V of the Rules for the Government of the Ohio Bar. That

Rule has been reproduced as an Appendix to Appellee's "Brief in Opposition to Appellate Jurisdiction, or in the Alternative to Petition for Certiorari" ("Opp. ____"). Appellant was interested in placing an ad similar to one which attorneys in Minnesota had run, which advised women who had suffered injuries from using the Dalkon Shield as a birth control device that it may not be too late to bring an action against the manufacturer of the device to recover damages for those injuries. The Minnesota ad contained a drawing of the Dalkon Shield, stated that the law firm was representing a number of women on a contingent fee basis, and gave telephone numbers and the address of the firm (J.A. 13). Eventually, counsel for appellee advised appellant that his ad would not comply with Disciplinary Rule 2-101(B), and he did not run the ad.

Two events rekindled appellant's interest in running the Dalkon Shield ad. On December 17, 1981, the Minnesota Supreme Court in *Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204, ruled that the Dalkon Shield brochures and letters issued by those lawyers were protected by the First Amendment, and on January 25, 1982, this Court issued its opinion in *In re R.M.J.,* 455 U.S. 191, which clarified the protections previously given to lawyer advertising under the First Amendment in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

Appellant then met with a member of appellee's staff to discuss his proposed advertisement in light of these decisions. The meeting was inconclusive, in part because appellee is not authorized to issue advisory opinions, and in part because there were items in appellant's proposed ad that were not specifically covered in *R.M.J.*.

However, because appellant believed that the Constitution permitted him to do so, and because he believed that he at least had the implicit approval of appellee, he decided to run the ad which appears at the top of page 5 and which is virtually identical to the proposed ad that he had discussed with appellee's staff. Between March 10, 1982, and May 22, 1982, this ad ran in 36 Ohio newspapers with a combined circulation of 1,860,160 (J.A. 16-17, ¶'s 29, 32; J.A. 21). As a result, approximately 235



DID YOU USE THIS IUD?

The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates

52 West Whittier Street

Columbus, Ohio 43206

individuals contacted appellant, and ultimately he filed lawsuits on behalf of 95 individuals, on a contingent fee basis, seeking damages for injuries sustained as a result of their use of the Dalkon Shield (J.A. 42, ¶'s 42-43).

The earlier advertisement run by appellant appeared for two days only, on November 25 and 26, 1981, in *The Columbus Citizen-Journal* (J.A. 9, ¶3). It provides as follows:

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

BEST AVAILABLE COPY

On November 26, appellant received a telephone call from a member of appellee's staff, advising him that this ad contained an offer to accept a criminal case on a contingent fee basis, which was prohibited by DR 2-106(C). Appellant immediately withdrew the ad and wrote appellee a letter confirming that fact and advising appellee that he had declined to represent two individuals who contacted him after reading the ad (J.A. 9-10, ¶'s 4-5).

2. The Charges

This disciplinary proceeding was commenced by the filing of a complaint by appellee on July 29, 1982. The principal focus of the complaint, which alleged a violation of various provisions of the Disciplinary Rules, was on the Dalkon Shield ad, even though none of appellant's clients ever complained about it (J.A. 41, ¶ 38).[1]

Count IV asserted that the ad violated DR 2-101(B) because it contained a number of items of information, including the description of a particular legal problem, which were not expressly authorized by the exclusive "laundry list" of matters which may be advertised under that Rule (J.A. 4). The same Count alleged that the ad also violated DR 2-101(A), which prohibits false and misleading advertising, but no specifics were cited to support that charge. However, neither the Board nor the Ohio Court found appellant guilty under either aspect of this Count. In Count V, appellee alleged that, because the ad contained a drawing of a Dalkon Shield, it violated DR 2-101(B), which prohibits the use of any illustrations in a legal services ad other than a picture of the lawyer or a portrayal of the scales of justice. Since appellant admittedly violated this Rule, the focus of the proceeding was on the constitutionality of the illustration ban.

[1]Counts I and VII will not be described because they did not allege any independent substantive violations.

The third separate charge against appellant on his Dalkon Shield advertisement was contained in Count VI. Ohio Disciplinary Rule 2-101(B) requires that advertisements must be "presented in a dignified manner," and appellee charged (J.A. 5, ¶ 19) that "the inclusion of a drawing or illustration or other representation of an I.U.D. . . . and the inclusion of comments which are directed at exciting action rather than informing the public does not constitute a 'dignified manner'" and thus violates DR 2-101(B). The same sentence also charged that "such material is detrimental to the public and serves no legitimate purpose which should or need be approved for legal service advertising . . . ." Not only was such conduct alleged to violate the specific rules governing advertisements, but it was alleged to have violated DR 2-102(A)(6), which prohibits a lawyer from engaging in "any other conduct that adversely reflects on his fitness to practice law." Although neither the Board nor the Ohio Supreme Court found a violation based on the specifics of this charge (or even discussed the allegation and its constitutional ramifications), it cannot be overlooked because it captures, far more than the specifics of the charges on which appellant was found guilty, the essence of appellant's offense as viewed by appellee, the Board, and the Ohio Supreme Court. *See also* Count IV, ¶ 10 (ad contains language which "is not *necessary* to advise the public of information which is needed to enable a consumer to properly identify or evaluate, a legal need . . . ")(J.A. 4, emphasis added).

Although more than eight months had passed since appellant had run the "drunk driving" ad, during which appellee never contacted appellant about the ad, he was also charged with violations based on it in Counts II and III.[2] The theory

[2]Under Rule V, Section 4 of the Ohio Supreme Court's Rules for the Government of the Ohio Bar, complaints are to be investigated within 60 days and dispositions made within 30 days thereafter (Opp., A-7; *also quoted* at J.A. 34, ¶ 47). The failure to comply with these time limits, especially for so simple a case as the drunk driving ad, further demonstrates that Counts II and III would not have been filed but for the charges made against the Dalkon Shield ad.

underlying both Counts was that appellant's offer of a full refund if the client were convicted of drunk driving was an offer to handle a criminal case on a contingent fee basis, which is specifically forbidden by DR 2-106(C). Thus, appellee alleged in Count II that appellant violated DR 2-101(B)(15) because the Rule forbids ads for contingent fees in criminal cases. And in Count III appellee charged that, since DR 2-106(C) forbids contingent fees in criminal cases, appellant's ad could not be fulfilled, and hence was false, fraudulent, misleading, and deceptive in violation of DR 2-101(A) (J.A. 3-4, ¶'s 3-7).

The parties entered into a detailed stipulation of facts on September 13, 1982 (J.A. 9-20). On the same day appellant filed a motion to dismiss, contending that the publication of the Dalkon Shield ad could not be prohibited consistent with the First Amendment. As to the drunk driving ad, he argued that, since it was not an offer to handle a case on a contingent fee basis, it was not subject to the disclosure requirements of DR 2-101(B) (15), and, for the same reason, did not violate the prohibition against contingent fees in criminal cases in DR 2-106(C). That motion was denied, and on December 17, 1982, appellee filed an amended complaint.

The principal purpose of the amended complaint was to add two new counts based on the Dalkon Shield ad. Count VIII (J.A. 25, ¶'s 24-27) focused on the fact that the ad stated that the representation would be on a contingent fee basis, but failed to contain any statement as to how such fees were to be computed. According to appellee, DR 2-101(B)(15) requires that all advertisements regarding contingent fees must disclose whether contingent fee percentages are computed before or after deduction of court costs and expenses. Since appellant did not include that information (indeed, he included no rate information at all, but simply stated that his representation would be on a contingent fee basis), he was alleged to have violated that Rule.[3] Appellee also charged that

[3]Presumably because the drunk driving ad stated that a full refund of legal fees would be paid if there were a conviction, and because it specified that expert witness fees must be paid in all cases, it met these affirmative disclosure requirements.

failing to include the information regarding the computation of the contingent fee was "likely to mislead the public" and hence was deceptive in violation of DR 2-101(A).

Whereas the portion of the original complaint covering the Dalkon Shield ad (Counts IV-VI) had focused on the content of the ad, the new charges in Count IX alleged that the placing of the ad, and the acceptance of employment from it, were not merely advertisements, but were improper acts of solicitation, and therefore violated the anti-solicitation Rules, DR 2-103(A) and DR 2-104(A) (J.A. 25-26, ¶'s 28-35). The first of these prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer (App. 28a-29a). According to appellee, appellant violated that provision because his ad recommended his own employment. The other provision, DR 2-104(A), prohibits an attorney from accepting employment (which appellant admittedly did) after giving "unsolicited advice" to an individual to "obtain counsel or take legal action" (App. 29a). Although the amended complaint does not specify the portion of the ad which violated this Rule (J.A. 25, ¶ 29), presumably the statement that the reader should not "assume it is too late to take legal action against the Shield's manufacturer" constituted the unsolicited legal advice or the recommendation to seek a lawyer's services. The complaint is clear, however, that, once appellant agreed to represent clients who responded to the ad, he had violated DR 2-104(A) (J.A. 26, ¶'s 31, 32, 34 & 35).

Appellant answered the amended complaint on January 14, 1983, and once again he raised the First Amendment, as well as numerous other defenses, to each of the charges involving the Dalkon Shield ad (J.A. 27-39). Paragraph 46 of his answer quoted paragraph 30 of the stipulation of September 13, 1982, which tracked precisely the language of DR 2-101(A) (App. 27a) and in which the parties agreed that:

> The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim (J.A. 34).

The parties entered into another stipulation of facts on May 24, 1983, and on that date a hearing was held before a three-member Panel of the Ohio Board of Commissioners of Grievances and Discipline (the "Panel").

3. The Evidence

At the hearing appellee offered in evidence three stipulations, copies of the two advertisements, and appellant's letter concerning the drunk driving ad. Appellant was also called to testify, principally regarding the Dalkon Shield ad. Appellee offered no evidence in support of the constitutionality of the Rules, and indeed argued that appellant should not be permitted to offer evidence on the constitutional issues either (T. 41, 51-52).[4] As a result of appellee's objections, the Panel did not formally admit much of appellant's testimony and most of his exhibits into evidence, but simply treated them as proffers (*see, e.g.*, T. 52, 67).

Despite appellee's objections, appellant offered substantial evidence on the constitutional question which focused on three basic propositions: (a) that there are substantial benefits to the public which flowed from the placing of his ad; (b) that illustrations are a highly useful means of communication and were particularly appropriate here; and (c) that there are potential benefits from increased lawyer advertising that are being thwarted, without justification, by the present Ohio Rules on advertising.

To demonstrate the first proposition, appellant introduced the testimony of two women who had developed serious

[4]References to the transcript of the hearing before the Panel are all to the original hearing record and will be cited as "T_____."

medical problems as a result of using Dalkon Shields, and who had contacted appellant and subsequently employed him after responding to his ad. Beverly Carr, age 37, testified that she first saw the ad in March 1982 and recognized the Dalkon Shield illustration in it as the birth control device that she had used (T. 175-76). As a result of wearing the Dalkon Shield, Mrs. Carr has become sterile, her reproductive system has been scarred, and half of it has been removed (T. 179). She further testified that she first learned about her legal rights when she called appellant, and that unless she had seen this ad or one similar to it, she probably would not have learned of those rights nor filed a lawsuit (T. 180).

Kaye Carver, a 30 year old secretary, testified that she saw the Dalkon Shield ad in the Sunday *Columbus Dispatch* in the spring of 1982, and recognized it as the device she had used for birth control a few years earlier (T. 186-87). She told the Panel that she had become pregnant while using the Dalkon Shield and had a child. However, she became pregnant a second time while still using the Dalkon Shield, and had a septic abortion (a miscarriage caused by an infection in the uterus) that her doctor told her could have been caused by the Dalkon Shield (T. 188-89). She also testified that she had previously talked to a lawyer about representing her, but the lawyer had told her that because too much time had passed since her injury, she could not sue the manufacturer (T. 189-90). It was only after reading appellant's ad and talking with him that she learned that the statute of limitations might not have run (T. 190).

In addition to this testimony concerning the value of the ad in enabling women to learn of their legal rights, appellant's expert, Dr. Robert L. Hallet, a medical school professor and obstetrician with more than 34 years of experience, explained the medical benefits derived from the ad.[5] Dr. Hallet testified

[5]Dr. Hallet did not appear at the hearing but was deposed prior to it. His deposition was not read at the hearing, but was attached to the trial record (T. 173-74). References to it will be "Dep.____." Counsel for appellee chose not to attend Dr. Hallet's deposition (Dep.5), nor did counsel attend the deposition of another of ap-

that a number of women were still using Dalkon Shields (Dep. 6-7) and that they should be removed (Dep. 11), because they are ineffective birth control devices and because they are potentially very dangerous (Dep. 7-8). In his view the advertisement served as a reminder to those women who knew that the product should not be used, which might prompt them to seek medical advice (Dep. 9-10). In his view, the ad might well have saved lives by causing women who were unaware of the dangers posed by the Shield to see a doctor (Dep. 11).

The second aspect of appellant's evidence was directed toward proving the benefits of the appellant's illustration, which Dr. Hallet referred to as a "very good portrayal" of the Dalkon Shield (Dep. 9). Dr. Paul V. Peterson, a professor of journalism and communications at Ohio State University, whom appellee agreed was qualified as an expert on the use of graphics (T. 48-49), testified about the importance of illustrations in general and of the Dalkon Shield illustration in particular. According to Dr. Peterson, illustrations are important in calling attention to a particular group of words, by enhancing the communication, by duplicating the message contained in the words, and by creating a vision to which people will respond in receiving the message (T. 53). In his view, advertisements are much less effective without illustrations (T. 54-55, 58, 60-61). He described the Dalkon Shield drawing as a "valuable part of this communication" (T. 54) in terms of capturing the attention of the reader.

Dr. Peterson also discussed and commented favorably on several ads of the Ohio State Bar Association that contained illustrations which, he believed, enhanced their ability to catch the attention of the reader (T. 63). By way of contrast, Dr. Peterson pointed out that the inclusion of a portrayal of the scales of justice or a picture of appellant in the Dalkon Shield ad would not have been effective since they have no relevance to the message which the ad is seeking to convey (T. 58-60).

---

pellant's expert witnesses, whose testimony was video-taped and played for the Panel (T. 141-43).

Also testifying on behalf of appellant was John Burpee, a vice president and accounts supervisor of the advertising agency which had developed the ads for the Ohio State Bar Association (Exs. 4-10, J.A. 45-51, T. 71-73). In Mr. Burpee's view, the illustrations contained in those ads helped attract the attention of the reader and helped to tell the story, which explains why "almost all the printed advertising contains some sort of illustration" (T. 74). The so-called "Uncle Harry" ad (Ex. 10, J.A. 51) used a photograph to capture the reader's attention and was so effective that it received an award from the Midwest Region of the American Federation of Advertising (T. 75). Supporting the prior testimony of Dr. Peterson, Mr. Burpee underscored the proposition that an illustration's initial mission is to gain the reader's attention and that time and again they have been proven effective for that purpose (T. 76).

Finally, appellant offered evidence to demonstrate the importance of lawyer advertising in general and the absence of any empirical basis for Ohio's restrictions, His first witness was Lori B. Andrews, a research attorney for the American Bar Foundation, who has also worked on the ABA's Commission on Advertising and its Commission on Public Understanding About the Law. Ms. Andrews is also the author of several articles and the book BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (T. 95-97). Based upon her research and experiences, she testified that lawyer advertising helps individuals identify their legal problems and assists them in finding a suitable lawyer (T. 106). She also discussed the recommendations of the ABA Commission on Advertising and of the Kutak Commission, which both advocated the elimination of most restrictions on truthful lawyer advertising (T. 107-109).

With regard to specific benefits from increased advertising, Ms. Andrews noted an Arizona study which indicated that increased advertising produced lower prices (T. 116, 120-21). She further observed that there was no evidence of reduced quality of legal work in jurisdictions that did not use the so-

called "laundry list" that Ohio had adopted (T. 110), nor is there any evidence of problems created by the use of illustrations (T. 123).

Appellant's final expert witness, Frank J. Benasutti, has been active for 15 years in lawyer ethics matters in Pennsylvania where he was, at the time of his testimony, chairman of the Commission of the Pennsylvania Bar Association whose duty it was to analyze the new ABA rules and to make recommendations (T. 142-45). The Commission, which is broadly representative of lawyers, judges, and members of the public, held hearings across the state regarding lawyer advertising as well as other matters (T. 146-47). Based on his experience, Mr. Benasutti believes that the laundry list approach taken by Ohio is not necessary for the protection of the public (T. 157) and that all advertisements should be permitted so long as they are truthful (T. 159). His study also led him to conclude that there are no special problems inherent in illustrations, that the public benefits from them, and that there is no evidence supporting the ban on illustrations contained in the Ohio Code of Professional Responsibility (T. 160-61, 166-67).

Appellant also took the stand on his own behalf, describing how he first became involved in Dalkon Shield litigation. When a woman first came to him with a possible Dalkon Shield lawsuit, he spent several weeks reviewing background materials on the device before agreeing to take the case (T. 194). That lawsuit led to a newspaper article that caught the attention of another woman, who also retained appellant (T. 195). These cases alerted appellant that there was a statute of limitations problem, particularly since it was uncertain whether Ohio would adopt a "discovery" rule for tolling the statute, as it eventually did (*id.*). He was also concerned because of the serious injuries that he had learned resulted from Dalkon Shields, such as infertility and life-threatening infections (*id.*).

He then testified about his efforts to advertise for clients who had been injured by a Dalkon Shield. First, he had run an

ad without a drawing, and with no specific mention of the Dalkon Shield, but that ad produced no response (T. 196). He then described the consideration he gave to placing an ad similar to the one that had run in Minnesota prior to the rulings of the Minnesota Supreme Court in *Appert & Pyle* and of this Court in *R.M.J.* (T. 195-97). He also recounted his meeting thereafter with counsel for the appellee, during which he received the mistaken impression that no action would be brought against him even though his ad constituted a technical violation of DR 2-101(B) (T.196-98). As he expressed it, "I felt in my own heart and in my own mind it was constitutionally protected" (T. 198), and he said that he would not have run the ad if he had not believed that he had the implicit consent of Disciplinary Counsel (T. 223). At the very least, this evidence demonstrated that the Dalkon Shield ad was placed in good faith, without any intention to violate the Rules.[6]

At the end of the hearing, the parties made concluding arguments, and thereafter on June 13, 1983, they submitted post-trial briefs. On June 24, the Panel issued its decision, which was adopted that day by the entire Board except for the recommended punishment.

4. The Board Decision

The Board, which is composed of seventeen members of the Ohio Bar who are appointed by the Ohio Supreme Court, first addressed the drunk driving ad. Appellee had based its case in Counts II and III on the proposition that the ad was an offer to handle a criminal case on a contingent fee basis, which is forbidden by DR 2-106(C). However, the Board found no violation based on this provision, since appellant had merely placed an ad, and had not entered a contingent fee

---

[6]Appellant also offered the testimony of Court of Common Pleas Judge George Twyford who had known him for almost 20 years. Judge Twyford testified that "if I needed a lawyer myself for a personal injury case, I would hire Mr. Zauderer" (T. 134). *See also* T. 135 ("I cannot even concede [sic] of his fitness being brought into question.")

agreement in a criminal case (App. 12a). The Board nonetheless found a violation, based on the prohibition against misleading advertisements in DR 2-101(A) because:

> It is general knowledge which can be determined from Municipal Court reports to the Supreme Court that, in disposing of driving while intoxicated (OM-VI) charges, in many cases, the charge is reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court. In that manner, the defendant would not be "convicted of drunken driving," and the legal fee would not be refundable. (App. 11a).

There was, however, no evidence in the record to support such a finding. In addition, the Board's theory of liability had never been urged by appellee, and thus appellant had no opportunity to offer evidence or present other defenses to it. Accordingly, in his August 24, 1983 brief to the Supreme Court of Ohio (pp. 76-82), appellant specifically argued that these departures from the charges brought by appellee constituted a violation of the Due Process Clause of the Fourteenth Amendment.

The Board also ruled that appellant's Dalkon Shield ad violated the Disciplinary Rules. First, it found that appellant had violated DR 2-103(A) (which it erroneously referred to as DR 2-102(A)), because the ad "implicity [sic] recommended that readers of the advertisement employ him or an associate before any reader sought his advice regarding employment of a lawyer" (App. 13a), a charge which, if sustained, would apply to virtually every ad that any lawyer had ever placed.

As to the charge alleging insufficient disclosures of appellant's contingent fee arrangement, the Board sustained the charge on two separate grounds, one of which had not previously been asserted by appellee. It agreed with appellee that a lawyer who mentions contingent fees in an ad must include all of the information in DR 2-101(B)(15) and that appellant had not done so (App. 14a). The Board also found that the ad was misleading, and hence violated DR 2-101(A), since it failed to disclose that the client would be liable for costs and expenses even if she did not prevail, and thus allegedly left the impression that the client would owe nothing. *Id.* Like the drunken driving finding, this charge had never previously been made, and appellant had no opportunity to defend himself against it.[7]

The Board next found that the inclusion of the Dalkon Shield drawing violated DR 2-101(B) and then offered a number of reasons why the prohibition against the use of nearly all illustrations was appropriate. The principal basis for the Board's conclusion was that:

> evidence and general knowledge with respect to newspaper, magazine, and television advertising make it clear that the use of illustrations can be the cause of misunderstanding, misleading interpretation of an advertisement, distraction from reading or understanding the significant messages of the verbal portion of an advertisement and in general, color the reaction of the viewer to the advertisement (App. 14a-15a).

The Board found it to be "not unreasonable" to prohibit appellant's illustration, while allowing a lawyer to include a picture of himself or a portrayal of the scales of justice (App. 15a).

Finally, the Board agreed with appellee that the statement that it was "not . . . too late to take legal action against the

---

[7]Unlike the other alleged violations regarding the Dalkon Shield ad, the failure to include specific fee rates and to state the client's obligation to pay costs could readily have been cured, with no adverse effect on the overall thrust of the ad, if appellee had indicated that there was a problem. So far as the record discloses, appellee's staff never raised the issue of contingent fee disclosures at the March 1982 meeting or at any other time. Indeed, these allegations were first made in December 1982 when appellee filed its amended complaint and included them in Count VIII (J.A. 25).

Shield's manufacturer," coupled with appellant's subsequent representation of those who responded to the ad and requested his services, violated the prohibition in DR 2-104(A) against offering legal advice and accepting employment based on it (App. 15a).

The Board next turned to the constitutional considerations, principally by reciting the holdings in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *In re R.M.J.,* 455 U.S. 191 (1982), and *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), and quoting extensively from *Ohralik* in upholding the application of the Rules to these ads (App. 15a-18a). However, it made no mention in its discussion of the evidence that appellant offered in support of his First Amendment defense. The Board then stated its conclusions and gave its recommendation. Although the Panel had recommended a public reprimand, the Board, while adopting all of the Panel's findings and conclusions, recommended that appellant be indefinitely suspended from the practice of law (App. 20a).[8]

5. The Decision of the Supreme Court of Ohio

The Supreme Court of Ohio affirmed each finding of a violation by the Panel and the Board. Its brief opinion contained very little discussion of appellant's claims that the Board has not properly interpreted the Disciplinary Rules, and it made no mention of the due process claims that appellant had raised. It briefly touched on the First Amendment issues, discussing only the *Bates* and *R.M.J.* decisions. It correctly noted that neither case entirely precluded states from regulating lawyer advertising, but then stated that the Rules involved here met the requirements of advancing a substantial state interest and were narrowly drawn (App. 6a-7a). It then announced its conclusion that all of the Rules which had been

[8]Under Ohio law, the minimum punishment for a violation of a Disciplinary Rule is a public reprimand, with the next most serious punishment a one-year suspension. Rule V, ¶ 6 (Opp. A-11). For a second offense, a lawyer must be indefinitely suspended or permanently disbarred, depending on the seriousness of the misconduct. Rule V, ¶ 7 *(id.)*.

called into question were reasonable and could constitutionally be applied to the Dalkon Shield ad. The Court recognized that appellant had introduced "a substantial amount of evidence . . . respecting the value of advertising to the public, and the unique value of respondent's Dalkon Shield advertisement in light of the public's limited awareness of the danger of that particular device . . ." (App. 2a-3a). However, it made no effort to weigh, as part of its First Amendment analysis, the benefits derived from the ad, including the fact that, because of it, nearly 100 women found a lawyer who agreed to represent them on a contingent fee basis and countless others learned of the connection between the Dalkon Shield and the injuries that they had suffered or might suffer in the future if the Shield were not removed.

The Court did not, however, adopt the punishment recommended by the Board, but instead imposed a public reprimand, as the Panel had suggested (App. 7a). The Court also imposed costs of $1,043.63 against appellant (App. 23a), and on May 23, 1984, it denied his motion to stay execution of its judgment pending appeal to this Court.

SUMMARY OF ARGUMENT

1. The fundamental flaw in the Ohio's First Amendment analysis of appellant's Dalkon Shield ad was in equating his ad with in-person solicitation. As this Court made clear in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), personal solicitation by a lawyer of a recent accident victim, who was still in the hospital, can properly be condemned only because it is likely to give rise to the kind of overreaching and undue influence that the state may legitimately forbid. Since the ad here, like that in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), was placed in a newspaper, the finding of misconduct can be sustained, if at all, only on some other proper rationale, and then only if the Rules forbidding such ads directly advance the governmental interest, by means no more restrictive than are necessary. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566 (1980).

Rather than offering specific justifications for the ban on appellant's Dalkon Shield ad, or introducing the evidence necessary to meet the other elements of the *Central Hudson* test, appellee has sought refuge in broad statements about the importance of regulating the legal profession and preventing misleading advertising. These generalizations are either insufficient to carry the state's burden, or are wholly irrelevant since appellee has stipulated that appellant's Dalkon Shield ad is not false or misleading (J.A. 17, ¶ 30).

Equally important, the Ohio Supreme Court wholly overlooked the substantial public benefits which may flow from advertising and which this Court recognized in *Bates, supra,* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). As appellant's witnesses made clear, many women first learned of the dangers of the Dalkon Shield and of the possibility of bringing suit to seek redress for their injuries when they saw appellant's ad. Not only were women made aware of their legal rights, but the ad may have prompted those who were still wearing the Dalkon Shield to visit their physicians and have it removed, thereby averting the possibility of serious injury, septic abortions, and even death. Particularly in light of the absence of any substantial governmental interest in prohibiting this ad, Ohio's failure to consider these benefits in undertaking the First Amendment balancing is another basis for setting the reprimand aside.

2. Ohio's ban on illustrations, other than a picture of a lawyer or a portrayal of the scales of justice, is also invalid under the First Amendment. The state offered no substantial justification for punishing appellant for including an accurate drawing of a Dalkon Shield in his ad, other than speculation that some ads which include illustrations may be misunderstood, hardly the kind of precise regulation required to overcome a First Amendment challenge. On the other side of the balance, the fact that a number of women would not have read appellant's ad without the Dalkon Shield drawing, and would thus have been denied the benefits of his messages,

surely outweighs the speculative interest asserted by the state to justify its ban on virtually all drawings.

Compounding the difficulty for the state is that DR 2-101(B), which prohibits appellant's drawing, nonetheless allows a lawyer to include a picture of himself or a portrayal of the scales of justice. The unrebutted testimony of appellant's experts made clear that the initial purpose of all illustrations is to catch the reader's attention. Consequently, Ohio's content-based choice permitting some illustrations but not others is subject to searching review under the First Amendment. Indeed, the evidence makes it clear that the illustration of the Dalkon Shield would be far more valuable than a picture of a lawyer or of the scales of justice, if such comparisons are at all relevant.

3. The final charge based on appellant's Dalkon Shield ad—that it said too little about his contingent fee arrangements—also violates the First Amendment. By requiring lawyers to include both the percentages they charge, and whether they are computed before or after expenses are paid, whenever contingent fees are mentioned in an ad, the Ohio Supreme Court has imposed burdensome affirmative disclosure requirements that lack any justification.

Apparently Ohio believes that potential clients may be misled by ads which do not set forth all of the required information on contingent fees, yet there is no evidence to suggest that such is the case. Moreover, the Ohio Supreme Court overlooked two points made in *Bates:* that ads are not the sole means by which clients obtain information before employing lawyers, and that some information is generally better than no information at all. *See* 433 U.S. at 374-75.

What Ohio seems to be saying is that clients have a right to know precisely what rates they will be charged and whether the charges will be computed before or after expenses are paid. We agree. But the Rule under which appellant was charged applies only to contingent fee cases, and no similar requirements are imposed for ads involving hourly rates or fixed fees, where similar problems of nondisclosure exist.

Even more important is the fact that Ohio has no requirement that the actual fee agreement (in contingent fee or any other cases) include such information, whether the client approaches the lawyer as the result of an ad, through a friend, or simply walks in off the street. Indeed, under the Ohio Code of Professional Responsibility, fee agreements are not required to be in writing, and the Code has no provision for mandatory disclosure of any terms in fee agreements. Thus, to the extent that the affirmative disclosure requirements for contingent fees in DR 2-101(B)(15) serve any state interest, they are both under- and overinclusive, a failure found fatal by this Court in decisions such as *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 793 (1978).

4. The charges against appellant based on his drunk driving ad also cannot stand because they violate the Due Process Clause of the Fourteenth Amendment. After the case was tried and argued, the Board developed a new theory, wholly different from the one which appellee alleged in the complaint and attempted to prove at trial. In order to support its new theory, the Board simply took judicial notice of certain Municipal Court reports, but gave appellant no opportunity to offer any evidence in rebuttal. When this due process violation was pointed out to the Ohio Supreme Court, it simply ignored appellant's argument and upheld the Board despite the absence of notice and an opportunity to reply.

The law is clear, however, that in attorney disciplinary proceedings such as this, shifts in theory and reliance on new evidence in the manner done here violate due process. *In re Ruffalo,* 390 U.S. 544 (1968). That rule has been applied in a variety of criminal and administrative law contexts, *see, e.g., Cole v. Arkansas,* 333 U.S. 196 (1948), and *Morgan v. United States,* 304 U.S. 1, 18 (1938), and the Ohio Supreme Court committed error in not applying it to the Board's change in theories and its taking judicial notice of the only "evidence" supporting the misconduct finding on the drunk driving charges.

ARGUMENT

I. THE FIRST AMENDMENT PRECLUDES THE OHIO SUPREME COURT FROM DISCIPLINING APPELLANT FOR PUBLISHING HIS DALKON SHIELD ADVERTISEMENT.

Introduction

Beginning nearly ten years ago in *Bigelow v. Virginia,* 421 U.S. 809 (1975), and continuing the following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), and nearly every term since then, this Court has established the permissible limitations of state regulation of commercial speech under the First Amendment. In 1980, this Court set forth a four-part test for this analysis in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566 (*"Central Hudson"*). Under that test, to be protected by the First Amendment, commercial speech must "first concern lawfully activity and not be misleading." *Id.* Next, the court must ask "whether the asserted government interest is substantial" and then "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

Within the general category of commercial speech, this Court has, on four occasions, examined the limits to which a state may go in restricting the ability of lawyers to attract business by both media advertising, *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977)(*"Bates"*), and *In re R.M.J.,* 455 U.S. 191 (1982) (*"R.M.J."*), and by more direct means, *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (*"Ohralik"*), and *In re Primus,* 436 U.S. 412 (1978) (*"Primus"*). And, although the sale of legal services differs in many respects from the sale of other goods and services, the *Central Hudson* analysis applies to lawyer advertising, while taking into account the special characteristics of the legal profession and its relation to the people it is licensed to serve. *R.M.J.,* 455 U.S. at 203. Thus, Ohio may regulate, but not prohibit lawyers from

truthfully publicizing the availability of their services, but it must do so within the confines of *Central Hudson's* requirements that any regulations directly advance a substantial interest in a manner no more restrictive than necessary.

In appellant's view, these cases provide the framework which clearly points the way toward reversal of the rulings by the Ohio Supreme Court on the Dalkon Shield ad for three separate, but related reasons. For most of these restrictions Ohio—*i.e.,* the appellee, the Board, and the Ohio Supreme Court—has not offered a substantial state interest of the kind required to defeat appellant's First Amendment challenge. Second, where justifications were offered, they were inadequate as a matter of law, as well as fact, to sustain the charges made against appellant's Dalkon Shield ad. And third, nowhere did the State take into account the very substantial benefits that accrued to the public as a result of appellant's ad.

There is one other preliminary point which should be noted. Although the Ohio Court treated appellant's First Amendment defense as a single issue, he was charged with three separate violations for the Dalkon Shield ad, each of which presents its own questions under the First Amendment, requiring separate consideration. *See Spencer v. Honorable Justices of the Supreme Court of Pennsylvania,* 579 F. Supp. 880 (E.D. Pa. 1984), where the court separately analyzed each of the plaintiff's objections in light of the specific interests served by disclosure of that item of information, balanced against the specific harm sought to be averted by the rule under challenge. Accordingly, we will now review each of the three charges in light of the justifications offered to sustain them under the First Amendment.

A. The Findings of Misconduct Based on the Anti-Solicitation Charges Violate the First Amendment.

The primary thrust of the solicitation charges against appellant is that he actively sought clients in violation of DR 2-103(A) and DR 2-104(A) by placing an advertisement in 36 Ohio newspapers directed at women who were injured by

Dalkon Shields, telling them that "it may not be too late" to sue the Shield's manufacturer for their injuries. By calling the conduct "solicitation" rather than "advertising," it may be that appellee and the Ohio Supreme Court hoped to avoid this Court's rulings in *Bates* and *R.M.J.,* upholding the rights of lawyers to advertise generally. However, it has long been established that "a state cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. 415, 429 (1963); *Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204, 211 (Minn. 1981) (*"Appert & Pyle"*) ("character of the mailing, be it solicitation or advertising, should not be treated as significant"). Since appellee has made no claim that the basic message of the advertisement (other than the matters relating to contingent fees) is in any way misleading or relates to an unlawful transaction, the finding of misconduct can be defended only if the remaining three aspects of the *Central Hudson* test are met.

Before considering the application of that test, a review of the specifics of these charges is necessary. The gravamen of the solicitation accusation under DR 2-104(A) is that appellant accepted employment after giving unsolicited advice (presumably legal advice although the Rule does not so specify).[9] That advice consisted of the statement that "it may not be too late" to sue for Dalkon Shield injuries because (although the ad did not say this in so many words) the statute of limitations had not run since the plaintiff (reader) had only recently discovered the connection between the injuries suffered and the Dalkon Shield. The ad also allegedly violated DR 2-103(A) because it contained a recommendation to employ appellant to handle Dalkon Shield litigation, a charge that could apply to any advertisement, and he accepted employment after making that recommendation, a violation

[9]The Ohio Supreme Court appears to have adopted this interpretation, as evidenced by its statement defending the constitutionality of the Panel's finding of misconduct that "it is *reasonable* for a state to impose restrictions upon lawyer advertising, prohibiting the lawyer from giving *legal advice* in a specific area and then recommending employment of himself to those who have not sought his advice" (App. 6a-7a, emphasis added). The Ohio Court's application of a standard of reasonableness in ruling on the First Amendment challenge was plainly in error.

that presumably could occur for any advertisement that produced clients. One other point is important in assessing the constitutionality of these charges: the inclusion of the drawing of the Dalkon Shield and the dispute about the disclosure of contingent fee rates and expenses are irrelevant since those matters were the basis of separate charges against appellant.

The first difficulty in sustaining these charges is in identifying "the substantial governmental interest" at stake in applying the prohibition to this case. *Central Hudson,* 447 U.S. at 566. Appellee offered no reasons to support the blanket ban on mass media communications of this type and indeed argued to the Panel that it was not required to do so (T. 41-42), even though this Court has made it clear that the party seeking to uphold a restriction on commercial speech has the burden of justifying it. *Bolger v. Youngs Drug Products Corp.,* 103 S. Ct. 2875, 2882 n.20 (1983). Nor did it heed this Court's warning in *Central Hudson* that the courts should "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566 n.9.

In its opposition in this Court, appellee argued that Ohio has a "substantial interest in regulating the legal profession," that it has similar interests in enforcing its disciplinary rules, and that it has a substantial interest in "promulgating disciplinary rules with which a large number of Ohio attorneys are in substantial agreement" (Opp. 6-7). In other places, it specifically referred to "the public interest of regulating the legal profession" and to the fact that lawyer advertising is intended "to attract clients," with lawyers having a "substantial pecuniary incentive" to do so. *Id.* at 8. And it made the unsupported assertion that due to its selective nature, "advertising by attorneys is not a reliable process for conveying accurate information to the public." *Id.* Plainly all of these interests were present in *Bates* and *R.M.J.,* yet provided an insufficient basis for the restrictions struck down there, and are thus inadequate here.

Not only did appellee fail to offer evidence before the

Panel to support the restrictions on the Dalkon Shield ad, but the Ohio Supreme Court also offered no justification in its brief discussion of the solicitation issue under the First Amendment. The Panel came the closest to identifying the state interest in prohibiting this truthful newspaper ad, which said no more than, "If you were injured by a Dalkon Shield, even if it happened several years ago, it may not be too late to sue, and our firm is willing to discuss representing you in litigation against the Shield's manufacturer." The Panel correctly recited the holding of *Ohralik,* which sustained the discipline imposed for what the Panel described as "in-person solicitation of legal representation while the anticipated client was confined to the hospital after having been injured in an automobile accident" (App. 16a). However, it then went on to find that the "in-person solicitation of employment by conference in Respondent's office, though voluntarily undertaken by the anticipated clients, is *not wholly different* from the *Ohralik* situation when the inequalities of the lawyer-client conference are considered" *(Id.,* emphasis added).

That was plain error. To equate the solicitation in *Ohralik* with the circumstances of reading a newspaper advertisement in the privacy of one's home is to overlook virtually the entire focus of the Court's opinion in *Ohralik.* The Court there upheld the discipline because it found that the conduct was "a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." 436 U.S. at 468; *see also id.* at 449 (state may discipline lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has the right to prevent"). This Court in *Ohralik* also enunciated the very distinction between in-person solicitation and advertising which the Ohio Court ignored: whereas advertising "simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457.

That contrast is reinforced by the Court's opinion in *Primus,* issued the same day as *Ohralik,* in which discipline based on anti-solicitation rules similar to those relied on by the Ohio Supreme Court here (*see* 436 U.S. at 418, 420, nn.10 & 11), was held to violate the First Amendment. In *Primus,* where the solicitation occurred through a letter written by the lawyer to the potential client, this Court observed that "the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct." *Id.* at 435-36; *see also id.* at 434, describing *Ohralik* as a solicitation "under cicumstances likely to result in adverse consequences." Moreover, as this Court has made clear, different methods of communication require different treatment, *see Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 501(1981), and thus, the court below erroneously equated media advertising and in-person solicitation because they are, contrary to what the Panel suggested, "wholly different" from each other.

As this Court has recognized on many occasions, someone who saw appellant's Dalkon Shield ad and who was not interested in reading it, could simply turn the page, an act requiring no more difficulty than "averting their eyes" or "transferring the [message] from envelope to wastebasket", practices which this Court found to obviate the state's objections in cases such as *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 542 (1980), and *Bolger v. Youngs Drug Products Corp., supra,* 103 S.Ct. at 2883. In short, this is not a case in which Ohio is seeking to prevent "the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference" which it may properly do. *See Primus,* 436 U.S. at 426. Despite the fact that this Court has made it clear that "commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental'," *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 n.6 (1977), the Ohio Supreme Court has done precisely that.

The failure of the State to articulate any substantial interest to support the ban on the Dalkon Shield ad makes it difficult, if not impossible, for it to show that the ban directly advances such an interest and does so in a way that is not unduly restrictive, as *Central Hudson* also requires. In addition, as this Court recognized in *Virginia Pharmacy Board* and *Bates,* a central component of the balancing process is the public's interest in receiving useful information that the state is suppressing. As one district court put it:

> *Bates* is not a decision for the benefit of the Bar; it is a decision for the benefit of consumers of legal services, and it is from their standpoint that the problem must be approached.

Durham v. Brock, 498 F. Supp. 213, 222 (M.D. Tenn. 1980); *see also, Bates,* 433 U.S. at 364 (discussing the benefits that flow from advertising); *Appert & Pyle,* 315 N.W.2d at 209 (interests at stake in allowing advertisement include those of lawyer and the public); *see generally,* G. Hazard, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services,* 58 N.Y.U. L. Rev. 1084 (1983).

There are a number of reasons why the benefits that would flow from allowing the Dalkon Shield ad more than outweigh any conceivable negative impact that permitting the ad might have. First, women who had used the Dalkon Shield learned a number of important facts, directly affecting them, solely as a result of the ad. They were informed that it was possible to sue the Shield's manufacturer for injuries which they sustained, that such suits might still be brought even if the injuries occurred several years before, that there was a lawyer who was already handling similar cases who would be willing to consider handling their case, and that he would do so on a contingent fee basis. As this Court has recognized, one of the principal dificulties in obtaining legal services is in finding a lawyer qualified to handle the consumer's particular problem, at a price the client can afford. *Bates,* 433 U.S. at 376; *see also* testimony of Lori Andrews (T. 106). Yet this ad, which Ohio has prohibited, provides precisely the assistance that potential clients need to overcome the information barrier.

Perhaps the clearest way to demonstrate the error of the Ohio Supreme Court is to revisit the portion of the ad in *Bates* advertising divorce services, modify it slightly, and view it through Ohio's analysis of DR 2-103(A) and DR 2-104(A). If that ad had said "the law in Arizona does not require married couples to stay married if either of them wishes a divorce," Ohio seems almost certain to have called that "unsolicited legal advice." And if the ad had also stated that "the law firm of Bates & O'Steen is available to do the necessary legal work for you, just as it's doing for hundreds of others each year," Ohio would probably have concluded that such a statement was an implicit "recommendation of employment." And if the Bates firm had accepted clients based on those statements, Ohio would surely have found the lawyers in violation of DR 2-104(A) and DR 2-103(A). While the actual ad in *Bates* is different in a number of respects (*see* 433 U.S. at 385), none of the differences is material for these purposes. Accordingly, *Bates* precludes the enforcement of these Rules in this situation, even if Ohio chooses to call the ad a solicitation.[10]

This is not a case in which the Court must speculate about the benefits that might flow from increased advertising, since the record amply demonstrates what the benefits are. At least 235 women responded to appellant's ad, and nearly 100 of them retained him to represent them in Dalkon Shield litigation. It is also clear from the testimony of appellant's two clients who appeared before the Panel that the ad was the direct link that enabled them to find an attorney and to bring a lawsuit to redress the serious injuries that they had suffered. Indeed, one of the women had previously seen a lawyer who had told her (incorrectly) that it was too late to sue (T. 190), and another testified that she was unaware of the connection

[10]Similarly, an ad embodying the "legal advice" that "if you don't have a will, the state will decide who gets your assets when you die," would seem functionally indistinguishable from the instant ad, but also indistinguishable from *Bates*, as would an advertisement announcing, "if you have been discriminated against in your job because of race, sex, religion or national origin, you may have a claim against your employer." *See State v. Schaffer*, 649 P.2d 355 (Okl. 1982) (upholding an ad involving "advice" regarding adoptions).

between her serious injuries and the Dalkon Shield until she saw appellant's ad (T. 179). While the Dalkon Shield manufacturer was undoubtedly displeased with the ad and the resulting litigation—its Ohio counsel contacted appellee about the ad (J.A. 41, ¶ 40)—this Court has made it clear in *Bates* that it "cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." 433 U.S. at 376.

Not only did hundreds of women learn of their legal rights and find a lawyer willing to sue to enforce them, but the ad, which was placed in the grocery section of newspapers "in an effort to provide information to as many women as possible" (J.A. 17, ¶ 31), also informed the reader that the Dalkon Shield is a potentially dangerous product. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (educational and fundraising functions of solicitation closely intertwined). As Dr. Hallet testified, a number of women are still wearing Dalkon Shields, and therefore publishing ads such as this may help to alert them of the need to have the Shield removed since it is both dangerous and ineffective (Dep. 7).

There is one other point which suggests that the provable benefits of this ad may significantly understate the increase in consumer awareness that it produced. Suing for injuries resulting from the Dalkon Shield, or even contacting a lawyer about the possibility of such litigation, is a very different matter from, for example, filing suit after slipping on the pavement in front of the supermarket. The injuries that were sustained from using the Dalkon Shield involve a woman's reproductive system, and any litigation would inevitably require discovery into how those most private parts of a women's body had been damaged. In addition, the Dalkon Shield was intended to be used as a birth control device, and thus the manufacturer would almost certainly seek to inquire into the sex lives of the plaintiffs to determine such matters as when the Shield was first used (*i.e.*, before marriage or after), whether the plaintiff had ever had venereal disease, as well as

other highly personal matters. Surely, no woman would lightly bring such a lawsuit unless she were convinced that she had been seriously injured, that the Dalkon shield had caused the injury, and that she had full confidence in her lawyer. Yet, it can hardly be doubted that, but for appellant's Dalkon Shield ad, nearly 100 women would never have embarked on such litigation.[11]

Since neither the Panel nor the Ohio Supreme Court cited *Central Hudson*, it is not surprising that neither undertook the balancing required by that decision, as well as by *Bates* and *R.M.J.*. But even if they had, it is plain that there is no substantial interest in suppressing the Dalkon Shield ad, and that there are substantial interests which were advanced when appellant ran the ad and accepted employment from clients who contacted him after reading it. Nonetheless, Ohio has publicly reprimanded appellant for doing what Ethical Consideration 2-1 of the Ohio Code of Professional Responsibility requires him to do—see that members of the public "recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain services of acceptable legal counsel." *See also Bates*, 433 U.S. at 377. Accordingly, for all these reasons, the First Amendment precludes Ohio from disciplining appellant for publishing the Dalkon Shield ad on the ground that such conduct constitutes improper solicitation of clients.[12]

---

[11]It also seems likely that appellee, if not the Ohio Supreme Court, was disturbed by the fact that appellant was advertising for cases involving injuries of this kind, as demonstrated by Count VI, which charged appellant with advertising in an undignified manner (J.A. 5, ¶ 19). However, this Court has held that states may not prohibit advertisements simply because they are offensive or embarrassing. *R.M.J.*, 455 U.S. at 205 ("bad taste" not a proper basis for banning an ad); *Bolger v. Youngs Drug Products Corp.*, *supra*, 103 S. Ct. at 2883 (allegedly "offensive" nature of mailing of contraceptive ads held insufficient basis to ban them).

[12]While the portion of the American Bar Association's new Model Rules of Professional Conduct on "Information About Legal Services" contains a number of restrictions, there is nothing comparable to DR 2-103(A) and DR 2-104(A) that would apply to appellant's Dalkon Shield ad. Rules 7.1-7.5, which cover this topic, and Rule 1.5(c), which deals with contingent fees, are reproduced in an Addendum to this brief ("Add." ____).

B. The Content-Based Findings Of Misconduct Based On The Inclusion Of The Drawing Of The Dalkon Shield And The Failure To Include The Details Of Appellant's Contingent Fee Agreement Violate The First Amendment.

1. The Dalkon Shield Illustration

Count V of the complaint charged that appellant's inclusion of an illustration of a Dalkon Shield in his advertisement violated DR 2-101(B), which prohibits "the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice." There is no dispute that the ad violated the Disciplinary Rule, nor is there any dispute that the illustration is, as Dr. Hallet described it, a "very good portrayal" of the Dalkon Shield (Dep. 9). Accordingly, the ban on illustrations can only be sustained if illustrations are shown to be "inherently misleading," *R.M.J.*, 455 U.S. at 207, or on the basis of some other substantial state interest. *See Regan v. Time, Inc.*, 104 S. Ct. 3262, 3271-72, 3294-96 (1984) (ban on illustrations of dollar bills of the same size and color as the original upheld in order to prevent counterfeiting).

Once again, the problem in defending this ban is that at no point did the Ohio Supreme Court, which issued the Rule and then upheld its constitutionality, ever identify the precise governmental interest being served. The Court merely stated something which surely applies to some ads—that a "potential client peering at a lawyer advertisement may be misled or confused by the expressed words, by an illustration or drawing, or by a combination of both" (App. 6a). But the possibility that *some* clients may be misled by *some* drawings cannot overcome a First Amendment challenge to a ban on *all* illustrations other than a picture of a lawyer or a portrayal of the scales of justice. Nor did the Panel's discussion of the constitutional question (App. 16a-19a) provide any

assistance, since it made no mention of the ban on illustrations in responding to appellant's First Amendment claim.[13]

In its opposition in this Court, appellee conceded that Ohio may not sustain its Rule on the ground that all illustrations are inherently misleading (Opp. 10). However, the same sentence went on to assert that "the state may rationally conclude that illustrations in attorney advertising are so inherently subject to abuse and manipulation through emotional or subconscious appeals as to be incapable of effective regulation through rational legal process." If that argument is not simply a restatement of the "inherently misleading" claim, it is difficult to understand what it means. Moreover, appellee offered no evidence to support that or any other ground for prohibiting the Dalkon Shield drawing, despite the clear dictates of *R.M.J.* that such proof is required in the face of a First Amendment challenge. *See* 455 U.S. at 202 ("the *record* indicates that a particular form or method of advertising has in fact been deceptive"), 205-06 ("[t]here is nothing in the *record* to indicate that the inclusion of this information was misleading"), 206 ("[b]ut again we deal with a silent *record*") ("[t]here is no indication in the *record* of a failed effort to proceed along such a less restrictive path") (emphasis added). Indeed, there is directly contrary testimony in this record on whether any harm might result from the use of illustrations in lawyer's ads: both of appellant's experts, who have studied the issue of lawyer advertising extensively, stated that there was no evidence of any such harms from illustrations and that, in fact, the public benefits from their inclusion in lawyers' advertisements (T. 110, 112, 160-61, 166-67).

A ban on all illustrations would be difficult enough to defend, but the exceptions in DR 2-101(B) for pictures of the lawyer or portrayals of the scales of justice make the Rule impossible to justify. As appellant's experts testified, all illustrations, including those permitted by Ohio, perform the

[13]The Panel did discuss illustrations earlier in its ruling, but did no more than state the same kind of truism as did the Ohio Supreme Court—"that the use of illustrations can be the cause of misunderstanding . . ." (App. 14a-15a).

primary function of attention-getting and the secondary functions of amplifying and clarifying the advertisement's message (T. 52-53, 74-76). *See also* App. 14a (Panel accepted the view that illustrations are principally attention-getters). Thus, any justification for the ban in DR 2-101(B) would also suggest a ban on the illustrations which Ohio allows lawyers to use. Accordingly, under cases such as *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 793 (1978), the Rule cannot stand because it is both underinclusive and overinclusive.

In its brief in opposition, appellee argued that scales of justice could be properly included because they are "generally accepted symbols of the rational balancing process of legal reasoning" (Opp. 10). How their inclusion in a printed advertisement benefits the consuming public is not explained, nor does that statement address the more relevant question, which is not why the scales of justice are allowed, but why all other accurate illustrations and photographs are prohibited. The same is true for appellee's attempted justification that a lawyer's picture, while not conveying much information, should be permitted because "people seeking public approval have the right to communicate to the public what they look like." *Id.*[14] These assertions simply underline what appellant's experts said at the hearing: all illustrations, including the two permitted ones, and including those in the ads of the Ohio State Bar Association (J.A. 45-51), are used to catch the reader's attention, and there is no rational basis for allowing some and not others, as long as they do not mislead the public.

Finally, if this Court were to find it necessary to compare the utility of having a drawing of the Dalkon Shield in appellant's ads, or his picture or the scales of justice, the record leaves little room for doubt that appellant's illustration is more valuable. First, it readily identified that it was a Dalkon Shield I.U.D. that caused the problem, rather than one of the

[14]Presumably, appellee is not arguing that Ohio should encourage clients to select their lawyers on the basis of their photographs, although that inference is certainly a permissible one based on this argument.

other I.U.D.'s on the market (J.A. 40-41, ¶ 37, T. 55). Second, one of appellant's clients testified that, but for the illustration, she would not have seen the ad and learned of her rights (T. 176-79). Dr. Hallet also testified that the illustration may have caused other women to recognize their need for medical attention if they were not previously aware of the problems caused by the Dalkon Shield (Dep. 9-11). Furthermore, appellant's other experts offered their opinions that advertisements are much less effective without drawings, since many people do not read the text and might not associate the term Dalkon Shield with the particular I.U.D. that they had used (T. 60-61, 84-85), a point confirmed by the failure of anyone to respond to appellant's previous Dalkon Shield ad which did not contain an illustration (T. 196). And as to the use of a picture of Mr. Zauderer or a drawing of the scales of justice, Dr. Peterson testified that they would have provided no help to the public since they are wholly irrelevant to the message appellant sought to convey (T. 58-60).[15]

Although the avowed purpose of DR 2-101(B) is to "further the process of an informed selection of a lawyer," its ban on illustrations produces precisely the opposite result. Based on both the record below and this Court's prior decisions, there can be little doubt that Ohio's ban on all drawings other than the scales of justice and a picture of the advertising lawyer does not meet the requirement that commercial speech must be regulated "with care and in a manner no more extensive than reasonably necessary to further substantial interests," *R.M.J.*, 455 U.S. at 207, and therefore cannot be upheld.

[15]The new Model Rules of Professional Conduct dealing with information about legal services (Rules 7.1 and 7.2) do not contain any prohibitions on the use of accurate illustrations or photographs (Add. 1-2).

2. The Affirmative Disclosure Requirements For Contingent Fees

The other two violations for which appellant was reprimanded are contained in Count VIII of the amended complaint and relate to certain nondisclosures regarding his contingent fee arangement. Appellant's ad merely stated that his representation in Dalkon Shield litigation would be on a contingent fee basis, but did not include either the percentages to be charged or whether those percentages would be computed before or after costs were paid. According to appellee, those omissions violated the specific requirements for inclusion of contingent fee rate information in DR 2-101(B)(15) and the prohibitions against misleading advertisements in DR 2-101(A).[16]

In assessing the constitutional validity of this ruling, four general points should be noted. Although appellee's amended complaint alleged that the failure to include the fee information was misleading, it had previously stipulated that:

[16]The Panel also found a violation of DR 2-101(A) on the ground that the advertisements stated that no legal fees would be owed if there was no recovery, which suggested that costs need not be paid either (App. 14a). Although the Ohio Supreme Court mentioned this violation in passing in its opinion (App. 3a, 5a), and appellee relied on it in its opposition in this Court (Opp. 9-10), there was no discussion of it in the body of the Ohio Court's opinion, and hence it is impossible to determine whether the Court upheld a finding of misconduct on this theory. As with the other charges, there was no evidence offered that clients would not be able to distinguish between legal fees and costs. More importantly, appellee never alleged that the failure to disclose that the obligation to pay costs was misleading. Count VIII, ¶ 27 of the amended complaint (J.A. 25) charged only that "the failure to include the qualification regarding *computation* of contingent fee is a violation of DR 2-101(B)(15) and a violation of DR 2-101(A) as a deceptive statement likely to mislead the public" (emphasis added). This allegation, coupled with the allegation in ¶ 26 that there was no statement "about the method for computing such fee as required by DR 2-101(B)(15)," makes it clear that appellant was charged under two different provisions for failure to include the information required by subpart 15. Because he was never charged with having made a misleading statement based upon the "no-legal fees" assertion being equivalent to a "no-cost assertion," it would be a violation of due process if he were found guilty of placing a misleading advertisement on that basis, for the reasons set forth in Point II, *infra*.

> The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim (J.A. 17, ¶30).

Second, the fact that the charge was not made in the original complaint suggests that if appellee found the ad misleading, it was only after several readings of both the ad and the Code that it reached this conclusion. Third, if there was a serious possibility that this advertisement was misleading, the problem should have been called to appellant's attention at either of his two meetings with appellee's staff when the problems could have been corrected. Finally, the interpretation of DR 2-101(B)(15) adopted by the Ohio Court comes perilously close to violating the notice requirements embodied in the Due Process Clause. As written, DR 2-101(B)(15) simply permits the publication of "[c]ontingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses," but gives no warning that it also imposes two affirmative disclosure requirements whenever contingent fees are mentioned. However, this Court need not decide the Due Process question since it is plain that the disclosure requirements here cannot meet the standards under the First Amendment.[17]

In its discussion of the First Amendment, the Ohio Supreme Court included a single paragraph relating to the issue of disclosure of contingent fees:

> Also, requirements relative to the content of the advertising concerning legal fees would be permissible under the United States Supreme Court rulings cited. Certainly for purposes of clarity to those reading a lawyer advertisement which refers to contingent fees, the requirement should be that such fees be specifically expressed, as well as any additional costs that might be assessed the client (App. 6a).

[17]It is more than a little ironic that the most controversial aspect of the ad in *Bates* was the inclusion of specific fee information and the phrase "very reasonable fees." *See* 433 U.S. at 386-87 (Burger, C.J., dissenting) and *id.* at 392-94 (Powell, J., dissenting). Yet here, where appellant avoided those potentially troubling statements, he finds himself accused of having put too little information in his ad about the rates that he charges.

Those two sentences do not, however, establish a substantial government interest of the kind required by *Central Hudson*. The first simply recognizes, as does appellant, that neither *Bates* nor *R.M.J.* absolutely prohibited states from regulating the contents of advertisements involving legal fees. The other seems to suggest that the relevant governmental interest is in preventing the public from being misled ("for purposes of clarity"), but that is by no means certain, although it is the position that appellee espoused in its opposition in this Court (Opp. 9-10).

There can be little doubt that preventing misleading advertisements is a substantial government interest, but Ohio must still establish, under *R.M.J.*, that the Dalkon shield ad is "inherently likely to deceive or [that] the record indicates that a particular form or method of advertising has in fact been deceptive." 455 U.S. at 202. If that cannot be shown, Ohio must establish that the disclosure requirement "directly advances the state interest involved" and that it could not be served as well by a "more limited restriction on commercial speech." *Central Hudson*, 447 U.S. at 564. Moreover, because Ohio has imposed a requirement of affirmative disclosure, it also must overcome another important aspect of *Central Hudson:* "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. *Bates v. State Bar of Arizona, supra* at 374." 447 U.S. at 562.

The principal difficulty in defending this requirement is that the Ohio Court failed to identify who is being misled and how. Nor could it sustain such a finding under the First

Amendment, since appellee offered no evidence to support the constitutionality of the Rule. *See Friedman v. Rogers,* 440 U.S. 1, 13-14 (1979)(ban on use of trade names for optometrists upheld because of prior history of abuses in the area).

It would be pure speculation to suggest that consumers generally do not appreciate the meaning of the term "contingent fee basis," or that they are ignorant of the difference between fees and costs. As this Court observed in *Bates,* the prohibition "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information." 433 U.S. at 374-75. Moreover, Ohio has not simply prohibited certain kinds of statements, but has mandated that every time a lawyer uses the words "contingent fee" in an advertisement, he must fully disclose his fee structure and state whether his rates are computed before or after costs are paid. These difficulties are particularly pertinent in determining whether Ohio's rule "directly advances" the asserted interest and whether it does so in a manner "not more extensive than necessary to serve that interest." *Central Hudson,* 447 U.S. at 556.

Other portions of the Ohio Code of Professional Responsibility also support the conclusion that the latter two standards in *Central Hudson* have not been met. The two subparts of DR 2-101(B) which follow subpart (15) on contingent fees [subparts (16) and (17)] permit a lawyer to advertise hourly rates and fixed fees for specific legal services (App. 28a). However, neither contains any requirement that such ads always include specific rates or total fees to be charged whenever the terms "hourly rates" or "fixed schedule of fees" are mentioned. Nor does either provision mandate the disclosure of costs, yet costs can surely be as important for fixed or hourly fee cases as they are in the contingent fee situation. The exclusion of such requirements under subparts 16 and 17, like the less than complete ban on illustrations, presents the same problems of under and overinclusion which caused the Court to find the rules at issue unconstitutional in

First National Bank of Boston v. Bellotti, supra, 435 U.S. at 793, and *Zablocki v. Redhail,* 434 U.S. 374, 390 (1978).[18]

There is another flaw in the mandatory disclosure requirement of DR 2-101(B)(15). As this Court observed in *Bates,* advertising does not "provide a complete foundation on which to select an attorney." 433 U.S. at 374. Thus, DR 2-101(B)(15) deals only with the contents of an advertisement and does not affirmatively require disclosures in any other situation. If Ohio were truly concerned with protecting clients from entering into contingent fee agreements without knowing precisely what rates applied, and whether the rates were computed before or after costs were deducted, and without assuring that the client knows that he or she is liable for costs even if the case is ultimately lost, it would require that *all* contingent fee agreements be in writing and contain such information. At the very least, it would require all attorneys, regardless of how a client came to their office, to provide such information before employment could be accepted.

But Ohio has no such rule. DR 2-106, which discusses fees, is the only arguably relevant section, and it says nothing whatsoever about any of these questions. Nor do the relevant Ethical Considerations (E.C. 2-19 and 2-20) provide any guidance other than a statement in E.C. 2-19 that fee agreements ought to be in writing. *Cf. Central Hudson,* 447 U.S. at 574-75 (Blackmun, J., concurring, on the ground that the state was trying to regulate by denying information, rather than controlling the undesirable conduct directly). By way of contrast, Rule 1.5(c) of the ABA's new Model Rules of Professional Conduct specifically requires that contingent fee agreements be in writing and that they "state the method by

---

[18]Mandatory disclosure also creates other problems. Many attorneys have no single rate applicable to all contingent fee cases, but may vary their charges depending on circumstances, including the likelihood of success, the amount of the potential recovery, and whether they include work done on appeal. Ohio's rule requiring disclosure of fee rates in every case would simply lead to uniformity, undoubtedly at the highest rather than the lowest level.

which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated" (Add. at l). Moreover, its new rules on advertising (specifically Rules 7.l and 7.2) contain no such mandatory disclosure of the kind found in Ohio's DR 2-l0l(B)(l5), and both of appellant's expert witnesses testified that they were unaware of any benefits from the "laundry list" approach adopted by Ohio, of which DR 2-101(B)(15) is one example (T. 110, 157-59).

The absence of mandatory disclosure requirements outside the rules on advertising, coupled with the failure of Ohio to require that contingent fee agreements contain such information, regardless of how the client learned of the lawyer's availability, demonstrate that there is no connection between the requirement of DR 2-l0l(B)(l5) and the goals that it purportedly seeks to achieve. The absence of such connection suggests that Ohio's affirmative disclosure requirements for advertisements for contingent fee cases are directed more at suppressing contingent fee ads than at preventing misleading information. This conclusion is reinforced by the fact that the requirements are likely to discourage lawyers from advertising which, in cases such as this, will mean fewer people will learn of their rights and will find a lawyer to vindicate them. *See Appert & Pyle,* 315 N..2d at 210 ("availability of contingent fee [for Dalkon Shield case] is an important consideration"). To the extent tht DR 2-l0l(B)(l5) may aid in reducing client deception, it is far broader than necessary, and its goals could be far better achieved by requiring that all fee agreements (or at least all contingent fee agreements) be in writing and include the information regarding rates and costs that Ohio now considers to be necessary for those who read advertisements for contingent fee cases. Because Ohio's rules on advertising in contingent fee cases, like those restrictions struck down in *R.M.J.,* are not closely tailored to the ends

they purport to advance, they cannot be sustained under the First Amendment.

* * *

While the justifications offered in support of Ohio's broad restrictions on lawyer advertising are plainly insubstantial, the very fact that this Court has before it for plenary consideration the fifth case in eight years involving lawyers who were disciplined for attempting to publicize the availability of their services points to the existence of a broader problem. Until this Court explicitly states that there is a heavy burden which must be met in order to sustain any restraint on non-misleading lawyer advertising, the Court will remain the final arbiter for a myriad of disputes like this one. Seven years after *Bates,* and nearly three years after *R.M.J.,* many states, including Ohio, continue to enforce highly restrictive provisions, such as the laundry list of permitted subjects contained in DR 2-l0l(B). Appellant submits that the time has come for this Court to make it clear that the sort of broad restrictions imposed by Ohio will not be countenanced and that the States have no choice but to revise their traditional rules so that regulation of lawyer advertising does not go beyond the narrow range permitted by the First Amendment.

II. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE CHANGED THE BASIS FOR OBJECTING TO HIS DRUNK DRIVING AD.

Counts II and III dealt with the drunk driving advertisement. Both proceeded on a common theory: the ad proposed a contingent fee in a criminal case, which is prohibited by DR 2-106(C). Since appellant did not enter into any such agreement, appellee acknowledged that he did not violate the substantive Rule. Appellee nonetheless argued that the ad was prohibited because it proposed an unlawful transaction, and hence the ad could be prohibited as deceptive under DR 2-l0l(A). In addition, appellee alleged that since the arrange-

ment was for a contingent fee, it was specifically forbidden by the introductory clause in DR 2-101(B)(15). These were the theories alleged in the complaint and amended complaint (J.A. 3-4, 22-23), and what appellee told the Panel had been proven at the hearing (T. 14, 43-44, 231-32). Appellant, on the other hand, argued that there was a significant difference between a contingent fee and the offer of a refund, and that his ad was not deceptive since he planned to make refunds if his defense was unsuccessful (T. 15-16, 26-27, 45, 237-38).

The difficulty for appellee is that neither the Board nor the Ohio Court accepted its theories. The Board found no violation of DR 2-106(C), and the Ohio Supreme Court did not even mention that provision. Instead, the Board based its ruling on an entirely new theory—that the ad was misleading because of what the Board said was the common practice of defendants pleading guilty to lesser included offenses when charged with drunk driving, a practice that was not proven by record evidence, but through judicial notice of unspecified court records. Under the Board's theory, a client who pled guilty to some lesser offense would not be convicted of drunken driving, no refund would be paid, and hence the public would have been misled by appellant's ad. However, the theory was never urged by appellee, but was invented by the Board after the trial, after all of the evidence was in, and after counsel had submitted their post-trial briefs. Indeed, in its brief to the Ohio Supreme Court, appellee recognized that this was a change in theory when it stated that it "certainly accepts the Board's findings" but then urged the Court to rule on the theory on which it had brought the charges and tried the case (Brief of Sept. 23, 1983 at 3-5).

Changing theories in midstream in lawyer disciplinary proceedings has been condemned by this Court in *In re Ruffalo,* 390 U.S. 544 (1968). There, this Court ruled that a lawyer is "entitled to procedural due process, which includes fair notice of the charge." *Id.* at 550. It went on to observe that the "charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the

accused." *Id.* at 551. The Court further noted that "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.* at 552.

A similar violation of due process was found in *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), where an appellate court had upheld a criminal conviction on the basis of a section of the law not charged, rather than the one on which the case was tried:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

As the Court stated, it is "as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *DeJonge v. Oregon,* 299 U.S. 353, 362 [1937]." *Id. See also Morgan v. United States,* 304 U.S. 1, 18 (1938) ("right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them"); and *Wolff v. McDonnell,* 418 U.S. 539, 564 (1974) ("Part of the function of the notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact"). And, as this Court recently observed in *Bowman Transportation Inc. v. Arkansas-Best Freight System Inc.,* 419 U.S. 281, 288 n.4 (1974):

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decisions so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Aside from the notice violation, due process was also offended because of the total absence of any evidence in the record to support the essential factual predicate relating to the practices at the Municipal Courts. *See Thompson v. Louisville*, 362 U.S. 199 (1960). Whether due process would allow the reports of the Municipal Courts, if indeed there are such documents showing a pattern of the kind asserted, to be received in evidence to prove the practice alleged would depend on whether there is sufficient assurance of their "underlying reliability and probative value." *Richardson v. Perales*, 402 U.S. 389, 402 (1971). But to take judicial notice of the contents of those reports, and to generalize about the practice in the Municipal Courts based on them, in order to make a determination of whether an ad is misleading, without giving appellant any opportunity to respond to the actual charge on which he was found guilty, is surely a violation of fundamental due process. *See Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").[19] *See also Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292 (1937) (agency reliance on judicial notice as a basis for proving essential facts held to violate due process). Moreover, the Ohio Supreme Court's casual acceptance of the Board's expansive use of judicial notice, especially in a First Amendment context, runs counter to this Court's requirement in *R.M.J.* that there be record support for a finding that an advertisement is misleading. *See* 455 U.S. at 202, 205-07.

Accordingly, either the absence of fair notice of the charges or the failure to offer evidence to support the claim that the drunk driving ad was misleading is sufficient to overturn the Ohio Supreme Court's ruling on Counts II and III. Taken together, they constitute a serious departure from the man-

[19] *But see Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

dates of the Due Process Clause and require a reversal of the reprimand based on the drunk driving ad.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ohio should be reversed, and the charges against the appellant dismissed.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

November 9, 1984

ADDENDUM
EXCERPTS FROM AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT ADOPTED AUGUST 2, 1983

RULE 1.5 Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

RULE 7.2 Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

RULE 7.3 Direct Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

RULE 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in a patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and

(c) (provisions on designation of specialization of the particular state).

RULE 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

MOTION FILED

NOV 15 1984

(5)

No. 83-2166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER,

Appellant,

—v.—

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, IN SUPPORT OF APPELLANT

CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd St.
New York, New York 10036
(212) 944-9800

BRUCE CAMPBELL
(Counsel of Record)
American Civil Liberties Union of Ohio Foundation
360 South Third Street
Columbus, Ohio 43215
(614) 228-8951

LITA C. MILLER
SCHWARTZ, SHAPIRO, KELM & WARREN
250 East Broad Street
Columbus, Ohio 43215
(614) 224-3168

Attorneys for Amici Curiae

99 pp

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION

The American Civil Liberties Union and the American Civil Liberties Union of Ohio Foundation respectfully move, pursuant to Rule 36.3 of this Court's Rules, for leave to file the attached brief *amici curiae*. Counsel for Appellant, Philip Q. Zauderer, has consented to the filing of this brief and his letter of consent has been filed with the Clerk. *Amici* have been unable to obtain the consent of the Office of Disciplinary Counsel of the Supreme Court of Ohio.

The American Civil Liberties Union (ACLU) is a national organization comprising more than 250,000 members. The American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is the

Ohio affiliate of the ACLU. The ACLU and its affiliates have been traditionally devoted to the protection and enhancement of fundamental liberties and basic civil rights.

Among the most fundamental of rights within our American society are the rights to speak and to hear, as guaranteed by the First Amendment. This Court has on numerous occasions held invalid governmental restrictions upon communications where the interests of speakers and listeners have been subject to undue infringement.

The instant controversy, involving the constitutionality of Ohio's rules governing attorney advertising, raises significant issues concerning the extent to which a state may impede the flow of truthful and accurate information concerning legal rights and services to

members of the public through broad speech prohibitions on attorney advertising. Amici believe that those rules significantly impair the ability of members of the public to gain access to information necessary to recognize legal problems, select an attorney, and, ultimately, assert and protect their legal rights. It is the position of amici that Ohio's attorney advertising rules impermissibly abridge the First Amendment rights of attorneys to disseminate, and members of the public to receive, such information. Amici respectfully submit this brief to advance their position to this Court.

Respectfully submitted,

Bruce Campbell

Bruce Campbell
(Counsel of Record)
American Civil Liberties
Union Of Ohio Foundation
360 South Third Street
Columbus, Ohio 43215
(614) 228-8951

Lita C. Miller
Schwartz, Shapiro, Kelm & Warren
250 East Broad Street
Columbus, Ohio 43215
(614) 224-3168

Charles S. Sims
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	vii
STATEMENT OF FACTS.....	vii
SUMMARY OF ARGUMENT.....	x
ARGUMENT.....	1
Introduction.....	
I. THE SPEECH PROHIBITIONS OF DR 2-101(B), DR 2-103(A) AND DR 2-104(A), AS APPLIED TO ADVERTISING, VIOLATE THE FIRST AMENDMENT RIGHTS OF APPELLANT TO DISSEMINATE, AND OF THE PUBLIC TO RECEIVE, INFORMATION.....	3
A. DR 2-103(A), As Applied Below, Violates the Protected Right of Members of the Public to Receive Legal Services Information Through Advertising.....	4
B. DR 2-101(B) and DR 2-104(A) Impose Impermissible Restrictions Upon the Noncommercial content of Advertising.....	9

Page No.

C. The Content Restrictions of DR 2-101(B) and DR 2-104(A) Impermissibly Impede the Flow of Commercial Information..... 24

II. DR 2-101(B) IS FACIALLY OVERBROAD AND SERVES NO GOVERNMENTAL INTEREST..... 37

III. DR 2-101(A) AND DR 2-101 (B)(15), AS APPLIED TO THE DALKON SHIELD ADVERTISEMENT, HAVE AN IMPERMISSIBLE CHILLING EFFECT UPON APPELLANT'S FIRST AMENDMENT RIGHT OF COMMERCIAL SPEECH..... 46

A. A Requirement of Disclosure of Specific Fee Information Through Advertising Does Not Further the State's Interest in Protecting the Public from Deceptive Commercial Practices..... 49

B. The State's Interest in Protecing the Public from Deceptive Commercial Practices by Attorneys May Be Served by Requirements Which Are Less Restrictive than a Requirement of Full Disclosure of Legal Fees and Related Costs in an Advertisement..... 53

Page No.

CONCLUSION..... 56

APPENDIX..... A-1

TABLE OF AUTHORITIES

Page No.

CASES

Bates v. State Bar of Arizona,
433 U.S. 350 (1977)..... passim

Bigelow v. Virginia,
421 U.S. 809 (1975)..... 25

Bishop v. Committee on Professional Ethics,
521 F. Supp. 1219
(S.D. Iowa 1981),
vacated 686 F.2d 1278
(8th Cir. 1982)..... 39

Bolger v. Youngs Drug Products Corp.,
___ U.S. ___, 103 S. Ct. 2875 (1983)..... 7, 14, 16-17

Brandenburg v. Ohio,
395 U.S. 444 (1969)..... 22

Central Hudson Gas & Elec. Corp. v. Public Service Comm.,
447 U.S. 557 (1980)..... 26, 49

Durham v. Brock,
498 F. Supp. 213
(M.D. Tenn. 1980)
aff'd 698 F.2d 1218
(6th Cir. 1982)..... 39

FCC v. League of Women Voters,
___ U.S. ___,
52 LW 5008 (July 2, 1984).... 5

In re Appert & Pyle,
315 N.W.2d 204
(Minn. 1981)..... 39

Page No.

In re R.M.J.,
455 U.S. 191 (1982)..... 37, 53

Kleindienst v. Mandel,
408 U.S. 753 (1972)..... 5-6

Lamont v. Postmaster General,
381 U.S. 301 (1965)..... 16

Linmark Assocs. v. Township of Willingboro,
431 U.S. 85 (1977)..... 6

Martin v. City of Struthers,
319 U.S. 141 (1943)..... 5

Maryland v. Joseph H. Munson Company,
___ U.S. ___, 52 LW 4875
(June 26, 1984)..... 43-44

McLellan v. Mississippi State Bar,
413 So. 2d 705
(Miss. 1982)..... 38

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981)..... 14, 23

Ohralik v. Ohio State Bar Ass'n.,
436 U.S. 447 (1978)..... 27

United Mine Workers of America v. Illinois State Bar Ass'n.,
389 U.S. 217 (1967)..... 13

United Transp. Union v. State Bar of Michigan,
401 U.S. 576 (1971)..... 13

Page No.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....7, 8, 15 25, 33

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I..... passim

U.S. CONST. amend XIV..... 2

RULES AND OTHER AUTHORITIES

OHIO CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, EC 2-1 to EC 2-15..... 3

OHIO CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, EC 2-16..... 30

OHIO CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, DR 2-101(A)..... passim

OHIO CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, DR 2-101(B)..... passim

OHIO CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, DR 2-103(A)..... passim

OHIO CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, DR 2-104(A)..... passim

INTEREST OF AMICI

The interest of amici, the American Civil Liberties Union and its affiliate American Civil Liberties Union of Ohio Foundation, has been set forth in the Motion for Leave to File Brief Amici Curiae.

STATEMENT OF FACTS

On June 29, 1982 a disciplinary Complaint was filed by the Office of the Disciplinary Counsel of the Supreme Court of Ohio against Appellant, Philip Q. Zauderer, following his publication of two legal service advertisements. The first advertisement related to his availability for representation of individuals charged with driving while intoxicated. That advertisement appeared in one newspaper for two days, and Mr. Zauderer accepted no employment as a consequence of it.

The second advertisement related to Mr. Zauderer's availability for representation of women who had sustained injuries from the use of an intrauterine birth control device known as the "Dalkon Shield". It contained a diagram of the Dalkon Shield and provided the following information: (a) the Dalkon Shield had been alleged to have caused serious injuries; (b) it may not have been too late to take legal action against the Dalkon Shield's manufacturer; (c) Mr. Zauderer's firm was representing women in such cases; and (d) fees for Mr. Zauderer's representation were payable on a contingent basis. The Dalkon Shield advertisement did not state Mr. Zauderer's contingent fee rates and did not describe potential litigation costs.

The Board of Commissioners on Grievances and Discipline ("Board"), the body designated to receive disciplinary complaints, recommended that Mr. Zauderer be indefinitely suspended from the practice of law, based upon several findings concerning the Dalkon Shield advertisement, including that: (a) use of the Dalkon Shield diagram violated the illustration ban of DR 2-101(B); (b) the advertisement was an implicit self-recommendation of employment in violation of DR 2-103(A); (c) Mr. Zauderer, through the advertisement, gave unsolicited legal advice and, therefore, his acceptance of employment violated DR 2-104(A); (d) failure to include specific cost information was misleading in violation of DR 2-101(A); and (e) failure to state

specific fee rates was a violation of DR 2-101(B)(15). The Supreme Court of Ohio affirmed the Board's findings* but declined to suspend Mr. Zauderer from the practice of law, and instead principly reprimanded him.

SUMMARY OF ARGUMENT

The right to receive information is a fundamental tenet of the First Amendment guaranty of free speech. Nowhere is that right deserving of greater protection against undue infringement than in cases involving

* The Ohio court also affirmed the Board's finding that the first advertisement, which offered fee refunds upon conviction of driving while intoxicated, was misleading because no statements were made concerning fees payable upon conviction of a lesser offense. However, since Mr. Zauderer accepted no employment from that advertisement, no person was found to have been misled. That advertisement was not held to have violated any other prohibition, and, therefore, is not further addressed herein.

restrictions upon communications concerning the availability of legal representation.

Challenged in this case is the application of certain of Ohio's attorney Disciplinary Rules to legal service advertising, DR's 2-101(A) and (B), 2-103(A) and 2-104(A). Amici believe that those Rules, as applied, violate the First Amendment rights of the public to receive and attorneys to disseminate meaningful legal services information.

In this case, the Supreme Court of Ohio has determined that advertisements which implicitly recommend an attorney for employment violate DR 2-103(A). Since virtually all legal service advertisements implicitly recommend employment of the advertising attorney, the effect of the court's decision is to prohibit attorney advertising in Ohio.

The Ohio court has further determined that advertisements which suggest the existence of legal rights are not permitted by DR 2-101(B) and DR 2-104(A). Information which concerns legal rights is noncommercial in the hands of its recipients and may not be restricted in the absence of a compelling state interest. No such interest has been demonstrated in this case.

Even if legal rights information could be considered commercial in nature, the prohibitions of DR 2-101(B) and DR 2-104(A) may not stand in the absence of a substantial state interest. No substantial interest exists in this case.

DR 2-101(B) prohibits the publication of any information in a legal services advertisement other than that expressly permitted by its

provisions. That Rule is incapable of any application which would not constitute an impermissible infringement of First Amendment rights and is, therefore, facially overbroad.

The requirements of DR 2-101(A) and DR 2-101(B)(15), as applied, prohibit advertising attorneys from disclosing that legal fees are payable on a contingency basis, unless specific fee rates and incidental costs are further disclosed. Such requirements are inappropriate where fees and costs may vary significantly. Information concerning the time and manner of fee payment is important to those in need of legal services, and its conveyance should not be impeded by restrictions which couple the right to disseminate it with an unrealistic requirement of full fee and cost disclosure.

Amici believe that DR's 2-101(A) and (B), 103(A) and 104(A), as applied below, create serious impediments to the receipt of meaningful information concerning legal services and legal rights, in violation of the First Amendment rights of the public and attorneys. Amici, therefore, urge the adoption of a false and misleading standard for the regulation of legal service advertising which gives due regard to both the inherent limitations of advertising and the capabilities of the public to appreciate those limitations.

ARGUMENT

Introduction.

At issue in this case is whether DR 2-101(A) and (B), DR 2-103(A) and DR 2-104(A), as applied, impermissibly restrict communication through legal service advertising.[1] Those Rules create substantial impediments to the flow of information between attorneys and members of the public in two respects. First, DR 2-101(B), the exclusive list Rule, DR 2-103(A), the anti-recommendation Rule, and DR 2-104(A), the anti-solicitation Rule, operate to limit the public's access to information which is essential for the recognition of legal problems and the

---

1 The full texts of DR 2-101(A) and (B), DR 2-103(A) and DR 2-104(A) are set forth in the Appendix.

informed selection of an attorney. Second, DR 2-101(A), the false and misleading standard, and DR 2-101(B)(15), the fee publication Rule, as applied below, require the dissemination of specific commercial information relating to legal representation prior to an opportunity for an attorney to assess the unique needs of potential clients.

Thus, the Ohio Rules restrict the flow of valuable noncommercial information to the public while compelling the premature dissemination of specific commercial information. For the reasons discussed below, those Rules cannot withstand challenge under the First and Fourteenth Amendments of the United States Constitution.

I. THE SPEECH PROHIBITIONS OF DR 2-101(B), DR 2-103(A) AND DR 2-104(A), AS APPLIED TO ADVERTISING, VIOLATE THE FIRST AMENDMENT RIGHTS OF APPELLANT TO DISSEMINATE, AND THE PUBLIC TO RECEIVE, INFORMATION.

The impact of Ohio's exclusive list, anti-recommendation and anti-solicitation Rules, as applied, upon the public's access to legal service information is far reaching. Ostensibly, those Rules are designed to assist members of the public in the process of attorney selection and recognition of legal problems, while shielding against abusive or coercive attorney misconduct. See EC 2-1 to EC 2-15, appended hereto. However, as applied, the Ohio Rules impermissibly infringe First Amendment rights while standing as a substantial barrier to acquisition of the type of information necessary for

the recognition of legal problems and the informed selection of an attorney.

A. DR 2-103(A), As Applied Below, Violates the Protected Right of Members of the Public to Receive Legal Services Information Through Advertising.

The constitutional guaranty of free speech is one designed to protect and preserve the process of exchange of information and ideas. It is a guaranty which reflects a basic trust and faith in the capabilities of our citizens to assimilate and act upon information for the benefit of themselves and others within the confines of an ever-changing, but civilized society. Thus, the First Amendment is concerned not merely with the right of a speaker to utter words, but more basically, the right of listeners to hear those words.

This Court has long recognized the "right to hear" as a fundamental tenet

of the First Amendment guaranty of free speech. As stated in Martin v. City of Struthers, 319 U.S. 141, 143 (1943): "[i]t is now well established that the Constitution protects the right to receive information and ideas." Moreover, the right to hear has been recognized in a variety of contexts encompassing the broad spectrum of both messages and media. See, e.g., FCC v. League of Women Voters, ___ U.S. ___, 52 LW 5008, 5012 (July 2, 1984) (messages through broadcast editorials); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (legal service prices through print media advertising); Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972) (political messages through in-person lectures).

The right to hear does not exist merely as an incident to the right to

speak. It is a constitutionally independent right, deserving of independent protection against unwarranted restrictions upon its exercise. See Kleindienst v. Mandel, 408 U.S. at 762-764 (in which this Court was called upon to balance governmental interests in regulating immigration against the First Amendment rights of American listeners to hear the words of an alien speaker who was, himself, without a First Amendment right to speak).

Notwithstanding the constitutional independence of the rights to hear and to speak, their exercise may be inextricably linked -- a restriction on one necessarily impinges upon the other. See, e.g., Linmark Assocs. v. Township of Willingsboro, 431 U.S. 85, 96-97 (1977) (holding ordinance prohibiting posting of residential "For Sale" signs

to be an impermissible infringement of both the right to convey and the right to receive available housing information). Therefore, any interest which a state may have in restricting speech must be measured against not only the First Amendment rights of a speaker to speak, but also the independent rights of listeners to hear. Only where the governmental interest outweighs both the right of a speaker and the right of his listeners may a restriction on speech withstand constitutional challenge. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-757 (1976).

It is well established that members of the public have a First Amendment right to receive information concerning products and services through advertising. See, e.g., Bolger v. Youngs Drug

Products Corp., ____ U.S. ____, 103 S. Ct. 2875, 2884-85 (1983) (birth control product information); Bates v. State Bar of Arizona, 433 U.S. at 365 (legal service price information); and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 770 (prescription drug price information). Implicit in the decisions recognizing that right is a realization that advertising serves as one of the most readily accessible sources of information for all members of the public. Thus, to the extent that DR 2-103(A) precludes advertising because of an implicit self-recommendation of employment, it impermissibly violates the right of the public to receive legal services information through advertising. See Bates v. State Bar of Arizona, supra. As earlier stated, virtually

every advertisement carries with it an implicit self-recommendation.

B. DR 2-101(B) And DR 2-104(A) Impose Impermissible Restrictions Upon the Noncommercial Consent of Advertising.

Beyond the question of whether Ohio's anti-recommendation Rule may be applied in a manner which wholly precludes advertising is the question of the extent to which the exclusive list and anti-solicitation Rules may be employed to limit content. In Bates, this Court held that a state may not constitutionally prohibit attorneys from advertising "the prices at which certain routine services will be performed." 433 U.S. at 367-368 (emphasis in original). Although acknowledging that states have substantial interests in the regulation of false, deceptive or misleading advertising, the Court held

that such interests could not justify content restrictions upon advertisements which inform the public of the nature, availability and cost of legal services. Thus, the Court stated:

> [O]ur cases have long protected speech even though it is in the form of a paid advertisement . . . .
>
> * * *
>
> The listener's interest is substantial: The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant social interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. * * * And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. * * * In short, such speech serves individual and societal

> interests in assuring informed and reliable decision-making.

Id. at 363-364.

Bates is of great importance in assessing the content restrictions of Ohio's exclusive list and anti-solicitation Rules and points squarely toward their constitutional invalidity. However, the restrictions of those Rules extend far beyond restrictions upon the dissemination of commercial price information considered in Bates. As applied to the Dalkon Shield advertisement, those restrictions focus directly upon the dissemination and receipt of information touching upon the nature and existence of legal rights -- i.e., a diagram which depicts a birth control device suspected of causing serious injuries among its users [prohibited by DR 2-101(B)]; a suggestion that the

manufacturer of that device may be legally accountable for such injuries [prohibited by DR 2-101(B) and DR 2-104(A)]; and a suggestion that there are time constraints upon an injured user's right to seek redress for her injuries [prohibited by DR 2-101(B) and DR 2-104(A)].

The exclusive list and anti-solicitation Rules, as applied below, operate as nothing less than content restrictions upon noncommercial speech. The direct effect of those Rules is to eliminate advertising as a vehicle through which members of the public may receive noncommercial information touching upon the nature and existence of legal rights, while permitting the dissemination of purely commercial information. In so doing, those Rules invert the constitutionally established

priorities afforded as between commercial and noncommercial speech, to the detriment of the very public they were intended to serve. For those Rules interfere not only with the public's right to receive noncommercial information bearing upon the existence of legal rights, but ultimately, all other rights which are dependent upon the receipt of such information -- not the least of which is the right to seek redress through the courts. See United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971) (right to obtain meaningful access to the courts impermissibly impaired by prohibition against union recommendations of selected attorneys to members); United Mine Workers of America v. Illinois State Bar Ass'n., 389 U.S. 217 (1967) (rights to seek redress and to associate

impermissibly impaired by restriction on dissemination of information concerning legal rights).

The cases of this Court "have consistently accorded noncommercial speech a greater degree of protection [against governmental restriction] than commercial speech." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981). Thus, while content restrictions on noncommercial speech have been upheld "only in the most extraordinary circumstances," content restrictions on commercial speech have been subject to a lesser degree of scrutiny. Bolger v. Youngs Drug Products Corp., 103 S. Ct. at 2879.

"[T]he degree of protection afforded by the First Amendment depends upon whether the activity sought to be regulated constitutes commercial or

noncommercial speech." Id. However, the process of classification may become complex where speech contains both commercial and noncommercial elements -- particularly where the values to the speaker and his listeners of the information passing between them are not equivalent. In such instances, it is necessary to identify with precision those elements of the speech which are the target of governmental restriction and to further determine whether the speech is noncommercial from the perspective of either the speaker or his listeners. Where the intended beneficiaries of a speech restriction are 'listening' members of the public, the focus upon the nature of the restricted speech should be from their perspective. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748, 756-757; Lamont v. Postmaster General, 381 U.S. 301 (1965). For rarely will members of that public be in a position to assert First Amendment rights to receive information if they are unaware of the existence of information as a consequence of a speech restriction designed and tailored to prevent its receipt.

The Dalkon Shield advertisement clearly contains both commercial and noncommercial elements. Thus, a careful examination of the joint operation of Ohio's exclusive list and anti-solicitation Rules as applied to that advertisement is essential "to insure that speech deserving of greater constitutional protection [than that afforded commercial speech] is not inadvertently suppressed." Bolger v.

Youngs Drug Products Corp., 103 S. Ct. at 2880.

Neither the exclusive list restriction of DR 2-101(B) nor the solicitation prohibition of DR 2-104(A) prohibits the publication of 'a commercially motivated advertisement for the services of a particular attorney.' Were that the case, one might well conclude that the speech sought to be restricted by those Rules is that which relates only to the commercial interests of the speaker and his listeners. Id. Paradoxically, DR 2-101(B) contemplates commercial speech, permitting the dissemination of a significant amount of commercial information through advertising, while prohibiting, directly and in tandem with the anti-solicitation Rule, virtually every type of noncommercial message which touches or concerns the

nature and existence of legal rights or the particular suitability of an attorney to assist in the assertion of such rights. Thus, with full sanction of Ohio's exclusive list Rule, an attorney may identify areas of law in which he is "available" to practice, but may not describe the types of rights with which those areas of law are concerned; he may state his age and the date of his admission to the bar, but not the length, extent or nature of his experience in dealing with particular kinds of legal problems; he may identify his scholastic distinctions, written publications, professional associations, and offices held, but may not identify the type of clients he represents. In short, an attorney may publish, in an advertisement, a substantial amount of purely promotional, commercial informa-

tion which gives the impression of stature and prestige within the profession and community, but may not publish information which identifies and describes the nature of the legal problems with which he deals -- regardless of how truthful and accurate the information may be.

The specific target of the prohibitions of Ohio's exclusive list and anti-solicitation Rules, as applied to the Dalkon Shield advertisement, is the noncommercial information included in that advertisement. It was the inclusion of information touching upon the nature and existence of legal rights and remedies which led the court below to find a violation of the anti-solicitation Rule. It was the inclusion of a diagram which visually described a factual prerequisite to particular

legal rights and remedies -- i.e., injury resulting from use of the Dalkon Shield -- which led the court to find a violation of the exclusive list Rule.

Even if information concerning the parameters of legal rights were viewed, from the perspective of an advertising attorney, as nothing more than a tool of his or her commercial trade, such information could hardly be characterized as commercial in the hands of the listening public. For in such hands information touching upon the nature and existence of legal rights is not a tradeable commodity, but rather a foundation for both evaluating the boundaries of permissible individual conduct within our society and preserving or restoring those boundaries from violation.

The mere fact that one might choose to retain an attorney who has published

information concerning specific legal rights does not render such information commercial. The recipient's interest in that information extends far beyond the mere formation of a commercial relationship with the attorney, to an interest in the assertion and protection of legal rights. It is, therefore, anomolous that although one has a right to receive noncommercial information concerning legal rights, he may not employ the attorney who conveys such information through an advertisement as a consequence of the restriction imposed by the anti-solicitation Rule, but rather must identify and seek the services of some other attorney with suitable expertise. As recognized by this Court in Bates:

> "[T]he middle 70% of our population is not being reached or served adequately by the legal profession. * * * Among the reasons for this under-

> utilization is . . . an inability to locate a suitable lawyer."
>
> 433 U.S. at 376 (emphasis added).

Although a state may impose reasonable "time, place and manner" restrictions upon noncommercial speech, it may not regulate the content of such speech in the absence of a compelling justification, such as an imminent threat to the public well being. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (in which this Court stated that a state may not prohibit speech which advocates violence unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action"). Moreover, once a state opens a particular channel of communication to commercial speech, it may not restrict the use of

that channel to preclude noncommercial speech by characterizing such restriction as nothing more than one upon time, place and manner. See Metromedia, Inc. v. City of San Diego, 453 U.S. at 515-516. Under such circumstances it is the noncommercial content which subjects the speech to restriction rather than the time, place or manner of its publication. Id.

In this case, there exists no compelling justification for the blanket prohibitions of Ohio's exclusive list and anti-solicitation Rules as applied to the noncommercial content of advertising -- particularly since those Rules permit the dissemination of a substantial amount of purely promotional, commercial information. Although the State does have a substantial interest in protecting the public from false and

misleading information, that interest cannot justify the overbroad speech prohibitions contained in the Ohio Rules.

The exclusive list restriction of DR 2-101(B), applied in conjunction with the anti-solicitation prohibition of DR 2-104(A), precludes advertising as a vehicle for the dissemination of truthful noncommercial information, while permitting advertising to be used for the dissemination of commercial information. Such restrictions cannot withstand constitutional challenge.

C. The Content Restrictions of DR 2-101(B) and DR 2-104(A) Impermissibly Impede the Flow of Commercial Information.

Even if the content of the Dalkon Shield advertisement were characterized as purely commercial, the restrictions of DR 2-101(B) and DR 2-104(A), as applied, fail to withstand constitu-

tional challenge. It is well settled that commercial advertising enjoys a measure of First Amendment protection against content regulation. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748; and Bigelow v. Virginia, 421 U.S. 809 (1975). The degree of that protection "turns on the nature of both of the expression and of the governmental interests served by its regulation," as measured by four successively applied criteria: (a) whether the advertisement concerns a lawful activity, and is not misleading; (b) whether a substantial governmental interest exists in regulating the content of the advertisement; (c) whether the content regulation directly advances the governmental interest; and (d) whether the content regulation is

more extensive than necessary to serve the governmental interest. Central Hudson Gas & Elec. Corp. v. Public Service Comm., 447 U.S. 557, 563 (1980).

There is clearly nothing unlawful or misleading about information which accurately describes the basis and nature of a legal right. In the context of advertising, such information is valuable in the identification of legal problems and the selection of a suitable attorney. Thus, the validity of the blanket speech restrictions of Ohio's exclusive list and anti-solicitation Rules, as applied below, turns upon whether some substantial state interest is directly advanced.

Among the interests which have been advanced by the State are those of: (1) protection of the public from inaccurate, misleading or deceptive

information (Brief for Appellee in Opposition to Jurisdiction at 7); (2) assurance that the private bar will support and assist in the policing of attorney misconduct (id.); (3) protection of the public from its own lack of sophistication (id. at 7-8); and (4) the provision of an enforcement mechanism which will obviate the need to assess the veracity of information conveyed to the public (id. at 8). But none of these asserted interests prove substantial enough to justify the broad restrictions imposed by DR 2-101(B) and DR 2-104(A).

No dispute exists as to the importance of insuring that the public receives accurate information and of protecting against attorney misconduct. See Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978). However, those

interests are not served by Rules which prohibit the dissemination, through a public medium, of the very information which is essential for the informed selection of a suitable attorney -- the description of legal problems and nature of the attorney's practice -- while permitting the dissemination of information which creates little more than a generalized impression of stature, prestige and expertise.

Underlying the prohibitions of Ohio's exclusive list and anti-solicitation Rules is the premise that publication of information concerning legal rights in tandem with purely commercial information is inherently harmful to the public. Thus, the State has asserted that "advertising by attorneys is not a reliable process for conveying accurate information to the

public" in light of an advertising attorney's pecuniary interest in attracting clients having the types of legal problems with which he or she deals. (Brief for Appellee in Opposition to Jurisdiction at 8). In essence, the State has suggested that any attorney who has an economic interest in conveying information will be motivated to convey inaccurate, misleading or deceptive information. Such suggestion implies little more than a very serious and unwarranted distrust in the ethical commitment of all attorneys who expect compensation for their services. This Court, in no uncertain terms, rejected a similar assertion made in Bates v. State Bar of Arizona, 433 U.S. at 379, stating:

> It is at least somewhat incongruous for the opponents of advertising to extol the

> virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.

There is nothing inherently wrong in the existence of some profit motive on the part of attorneys whose livelihood is the practice of law. It simply does not follow that an attorney who has an economic interest in advertising his or her services will engage in unethical or unprofessional conduct. As recognized by EC 2-16, "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation

for services rendered. . . . " An unjustified, unwarranted distrust of the ethical commitment of the legal profession by those who regulate it -- attorneys themselves -- hardly rises to the level of the type of substantial interest which would justify the content restrictions of either the exclusive list Rule or the anti-solicitation Rule as applied to advertising.

The suggestion that members of the private bar would fail to police attorney advertising misconduct under Rules less content restrictive than DR 2-101(B) and DR 2-104(A) is similarly insubstantial. Again, such suggestion does little more than cast unwarranted doubt upon the collective ethical commitment of members of the bar to protect and "uphold the integrity and honor of their profession and of the

legal system". Bates v. State Bar of Arizona, 433 U.S. at 379. It is in the interest of the private bar to police attorney advertising misconduct, and, "as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust." Id.

The asserted interest of protecting members of the public from their own non-sophistication hardly serves as justification for prohibiting the conveyance of truthful and accurate information through advertising -- any more than it would justify such prohibitions in any other media context. The First Amendment does not assume sophistication on the part of listeners. The First Amendment assumes that only through the flow of unrestricted speech will members of the public acquire the degree of sophistication necessary to

act in their own best interests. Thus, in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 420 U.S. at 770, this Court held invalid a Virginia statute which, like the Rules at issue in this case, wholly precluded the publication of certain information based upon a concern with the public's lack of sophistication, stating:

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. * * * But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely

available, that the First Amendment makes for us.

The interest of protecting the public from its own non-sophistication concerning legal services is simply not served by keeping the public ignorant -- particularly where the lack of readily available information concerning legal problems and services is the primary obstacle to the assertion and protection of legal rights. The interest of protecting the public will be best served if more information is made available through non-intrusive public sources such as advertising, not less. Bates v. State Bar of Arizona, 433 U.S. at 375.

Finally, the difficulty which the State has suggested would exist with the enforcement of Rules less restrictive than the exclusive list and anti-solicitation Rules is plainly

insufficient justification for those restrictions. It is disingenuous to assert that application of a simple "false and misleading" standard would in some fashion increase the regulatory burden of enforcement against attorney misconduct, due to the difficulty of verification of the truth of information contained in advertisements. If attorneys were, collectively or individually, predisposed to disseminate inaccurate information through advertising -- which is subject to public view and scrutiny -- the enforcement burden imposed upon the State will not be lessened by advertisement prohibitions. For such attorneys would surely be no less likely to violate ethical obligations in the privacy of their own offices than in the public forum of advertising. See Bates v. State Bar of

Arizona, 443 U.S. at 379. An 'out of sight, out of mind' approach to the regulatory burden of policing attorney misconduct hardly protects the public from the dangers of such misconduct. The desire of the State to decrease its regulatory burden by preserving such an approach is both an insubstantial and inappropriate interest.

The asserted interests for the advertising content prohibitions of DR 2-101(B) and DR 2-104(A) are wholly insufficient. The interest of protecting the public against the dissemination of inaccurate or untruthful information can be best served by simply prohibiting "misleading, false or deceptive" information while permitting the disclosure of any information which will assist members of the public in informed attorney selection. In no

event should Rules which restrict the free flow of information to the public through a medium such as advertising be permitted to stand as an obstacle to the First Amendment rights of those in need of information, based upon unwarranted assumptions as to the ethical commitment of the legal profession.

II. DR 2-101(B) IS FACIALLY OVERBROAD AND SERVES NO GOVERNMENTAL INTEREST.

In this case the Court is presented with yet another First Amendment challenge to a state's exclusive list rule as applied to legal service advertising -- Ohio's DR 2-101(B). The first such challenge arose in Bates, in which this Court held that Arizona's exclusive list rule could not be constitutionally applied to prohibit the inclusion of price information in an advertisement. Subsequently, in In re R.M.J., 455 U.S.

191 (1982), this Court held that Missouri's exclusive list rule could not be applied to prohibit descriptive references to areas of legal practice which differed from those sanctioned by that rule. Although the decisions in Bates and R.M.J. have made clear that legal service advertising is deserving of a significant measure of protection against the type of blanket speech restrictions imposed by exclusive list rules, those decisions have been limited to specific types of advertising information. Thus, the question of the constitutional validity of exclusive list rules has been left for case-by-case determination not only by this Court, but lower courts as well. See, e.g., McLellan v. Mississippi State Bar, 413 So.2d 705 (Miss. 1982) (office hours, date of admission to bar); In re

Appert & Pyle, 315 N.W.2d 204 (Minn. 1981) (advertisement content similar to Dalkon Shield advertisement); Bishop v. Committee on Professional Ethics, 521 F. Supp. 1219 (S.D. Iowa 1981), vacated on other grounds 686 F.2d 1278 (8th Cir. 1982) (racial identity, logos); and Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), aff'd 698 F.2d 1219 (6th Cir. 1982) (areas of practice).

Amici believe that exclusive list rules which impose blanket speech prohibitions, without regard to the truth or accuracy of advertising content, are impermissibly overbroad and will continue to generate numerous challenges in the absence of a clearly enunciated standard against which to measure the First Amendment protections afforded to such advertising. We therefore urge the Court, in this case, to take a swifter,

more simple approach and to hold that Ohio's DR 2-101(B) is overbroad and may not constitutionally prohibit the publication of information which is neither false, disceptive, nor misleading.

DR 2-101(B), on its face, is impermissibly overbroad, precluding the dissemination through advertising of virtually every type of noncommercial expression which bears upon the existence and nature of legal rights. The overbreadth of that Rule creates a unique and serious dilemma for those who, but for the Rule's prohibitions, would be the recipients of such information. For unlike an attorney who possesses both the information he wishes to convey and knowledge of the restriction upon his ability to convey it, members of the public are unlikely to

possess either. Under such circumstances, those having a First Amendment right to hear will rarely be in a position to recognize and challege infringements upon that right. Thus, the need to assess the applicability of the overbreadth doctrines arising under the First Amendment is particularly strong where speech prohibitions are purposely designed to prevent the public from receiving all but specified types of information without regard to the truth and accuracy of such information.

In Bates this Court considered the applicability of the 'third party' overbreadth doctrine to advertising -- i.e., that one ought to be permitted to challenge a speech restriction on the qround that it could be unconstitutionally applied to the conduct of another. 433 U.S. at 380. In that case

the Court declined to apply the 'third party' overbreadth doctrine to professional advertising, observing: "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." Id. at 381. However, in Bates the issue presented for review was narrowly drawn to the question of a state's ability to constitutionally prohibit the publication of price information. Id. at 366, 367. Thus, this Court was not called upon the consider the applicability of the third party overbreadth doctrine as it relates to noncommercial speech in advertising. More basically, this Court did not, in Bates, rule upon the applicability of the First Amendment

doctrine of 'facial overbreadth' as it applies to restrictions on advertising.

In Maryland v. Joseph H. Munson Company, __ U.S. __, 52 LW 4875, 4880, n. 13 (June 26, 1984), this Court recognized the distinction between the doctrines of third party overbreadth and facial overbreadth:

> "[O]verbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. . . . "Overbreadth" has also been used to describe a challenge to a statute that in all of its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest. . . . Whether that challenge should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in

> all of its applications falls short of constitutional demands.

Ohio's exclusive list Rule, DR 2-101(B), is fatally flawed, not merely because it is capable of being unconstitutionally applied to the protected speech of some, but because it is wholly incapable of any application which would not constitute an infringement of the First Amendment right of free speech.

Unlike the speech restrictions imposed by the false and misleading standard of DR 2-101(A), which are drawn with a large measure of precision to prohibit only non-protected speech, DR 2-101(B) knows no such precision. Although the purpose of DR 2-101(B) is the protection of the public from the receipt of false and misleading information, that Rule does nothing more than prohibit the publication of any

message not expressly permitted by its provisions. The exclusive list Rule does not subject an attorney to disciplinary sanctions for violation of its prohibitions because his speech is false or misleading, as does DR 2-101(A), but merely because he has spoken.

To the extent that DR 2-101(B) is intended to further the State's interest in protecting the public, that Rule adds nothing to the protection already afforded by the false and misleading standard. At best, the prohibitions of Ohio's exclusive list Rule are unnecessary for the protection of the public. At worst, the imprecision of that Rule creates a very real and very unnecessary risk that members of the public will be precluded from receiving protected speech, in violation of their First

Amendment rights to hear, without the knowledge necessary to challenge infringements of those rights. Thus, DR 2-101(B) is facially overbroad and may not withstand First Amendment challenge in this or any case.

III. DR 2-101(A) AND DR 2-101(B)(15), AS APPLIED TO THE DALKON SHIELD ADVERTISEMENT, HAVE AN IMPERMISSIBLE CHILLING EFFECT UPON APPELLANT'S FIRST AMENDMENT RIGHT OF COMMERCIAL SPEECH.

In contrast to the content prohibitions of the exclusive list and anti-solicitation Rules are the requirements of the false and misleading standard and the fee publication Rule, as applied below. Those Rules compel an attorney who advertises that fees are payable on a contingency basis to further disclose specific fee rates and costs related to litigation.

The court below determined that the failure to fully disclose specific contingent fee rates and additional costs in the Dalkon Shield advertisement constitutes a violation of the fee publication requirement of DR 2-101(B). Such omissions also formed the basis of the court's determination that Mr. Zauderer published misleading communications in violation of DR 2-101(A). Those Rules, so applied, operate to impose an unwarranted requirement upon attorneys to disclose specific commercial information about their services prior to the opportunity for assessment of the needs of individual clients.

Such requirements are inappropriate where the legal services described involve more complex areas of law and fact patterns. The more complex the

legal issues involved and the greater the variation in the factual circumstances to which such issues apply, the less able the attorney to determine the amount of time which will be required by a potential client's legal problem and the costs related to that problem, prior to actual discussion. Thus, if an attorney were compelled to disclose, in an advertisement, specific fee rates and to identify specific costs, he or she would be required to do so without the benefit of necessary information. Such a requirement would have a chilling effect upon the attorney's right to disseminate any information, through an advertisement, concerning contingency fee arrangements regardless of the value of such information.[2] Such a restric-

---

[2] Those seeking legal services have great concern respecting not only

tion, particularly as applied to the Dalkon Shield advertisement, does not meet the criteria for permissible content regulation of commercial speech as set forth in Central Hudson Gas & Elec. Corp. v. Public Service Comm., supra. Specifically, such a restriction fails to advance a substantial State interest in the least restrictive manner.

A. A Requirement of Disclosure of Specific Fee Information Through Advertising Does Not Further the State's Interest in Protecting the Public from Deceptive Commercial Practices.

The State has a substantial interest in imposing certain restrictions upon the dissemination of legal services

---

[2] (continued) the amount of fees, but also how and when fees are to be paid. Recognition of such concern is implicit in DR 2-101(B)(11) which permits attorneys to state merely whether credit arrangements are available.

information where the ultimate harm is likely to be deception of the public about the expense of legal representation. However, a restriction upon the dissemination of information concerning the timing and manner of fee payment (by coupling an attorney's right to disseminate such information with an obligation to further identify specific fee rates and related costs) does not serve the State's interest or the interests of potential clients.

The failure to identify actual contingent fee rates in an advertisement is simply not deceptive or misleading any more than any advertisement for a particular product or service which makes no reference to price could be considered deceptive or misleading. Moreover, a requirement that an attorney disclose fee rates and related costs

prior to any opportunity for assessment of the needs of a particular individual could actually operate to mislead the public in several ways. First, such disclosure may inaccurately convey the impression that there exists no reasonable relationship between the unique needs -- factual and legal -- of a client and the time and expense involved in asserting his legal rights. Second, such disclosure may inaccurately imply that the costs -- other than attorneys fees -- of asserting those rights is so substantial as to dissuade an individual from seeking o[illegible] further information, or ultimately seeking legal representation. Third, a generalized description of the types of potential related costs -- e.g., medical reports, expert witness, long distance telephone charges -- may have little meaning in the absence of

an explanation and discussion as to why such items are necessary and when or whether such expenses will actually arise.

It is not disputed that conveyance of information concerning fee rates and costs is essential in the formation of any attorney-client relationship.[3] However, where the legal services offered relate to non-routine legal problems for which fees and costs may vary significantly as between clients, the physical space limitations of advertising coupled with its nonconversational nature may render it an unsuitable vehicle by which to convey

---

3 No evidence was presented in this case which suggests any failure by Mr. Zauderer to disclose his fee rates and potential costs prior to entry into any attorney-client relationship.

meaningful information concerning specific fees and costs.

B. The State's Interest in Protecting the Public From Deceptive Commercial Practices By Attorneys May be Served By Requirements Which Are Less Restrictive Than a Requirement Of Full Disclosure of Legal Fees and Related Costs in an Advertisement.

Even if the state's interests were served by a requirement that contingent fee rates and relates costs be disclosed in advertising which contains a reference to the manner of fee payment, such a requirement is not the least restrictive means of advancing the State's interest. See In re R.M.J., 455 U.S. at 206 (wherein the Court affirmed the application of the "least restrictive means" test to determine the validity of legal service advertising restrictions). If the interest to be

served is to assure that members of the public understand and appreciate the costs involved in legal representation prior to entering into a contractual relationship for legal services, that interest could be equally if not better met in a manner which affords the opportunity both for the attorney to assess the needs of a potential client and the potential client to ask specific questions about the costs involved. Thus, it might be required that advertisements contain a warning that the financial terms and conditions of legal representation have not been fully disclosed and may vary depending upon the specific circumstances of each individual. See Bates v. State Bar of Arizona, 433 U.S. at 384 (wherein this Court stated that warnings or disclaimers might be required). Advertising attorneys could be required to discuss,

without charge, the types of financial commitments which would be involved in connection with their services. Moreover, advertising attorneys could be required to provide written disclosure statements as to costs and fees of particular types of legal representation. Each of these alternatives, alone or in some combination, would assure that potential clients receive adequate disclosure as to fee rates and costs, in the context of their specific legal needs, prior to undertaking a contractual obligation to pay for legal services.

CONCLUSION

The Rules at issue in this case impermissibly restrict advertising in violation of the First Amendment rights of attorneys and members of the public. The prohibitions imposed by those Rules

preclude the conveyance of both commercial and noncommercial information.

Advertising cannot fulfill all of the informational needs of the public. However, it can provide members of the public with "threshold" information necessary for the recognition of legal problems and the identification of a suitable attorney.

The needs of the public will best be served by applying a "false, misleading or deceptive" standard to advertising, giving due regard to both its inherent limitations and the public's recognition of such limitations. Amici respectfully urge this Court to adopt such a standard for the regulation of legal service advertisements.

Respectfully submitted,

Bruce Campbell
(Counsel of Record)
American Civil Liberties
Union of Ohio Foundation
360 South Third Street
Columbus, Ohio 43215
(614) 228-8951

Lita C. Miller
Schwartz, Shapiro, Kelm &
Warren
250 East Broad Street
Columbus, Ohio 43215
(614) 224-3168

Charles S. Sims
American Civil Liberties
Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

APPENDIX

OHIO CODE OF PROFESSIONAL RESPONSIBILITY,

Canon 2

ETHICAL CONSIDERATIONS

EC 2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

EC 2-2. The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers

acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment of particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.

EC 2-3. Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of

advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

EC 2-4. Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers

advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all

apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained herein.

EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputa-

tions of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many layment have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

EC 2-8. Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties--relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommen-

dation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

EC 2-9. The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistice expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal

system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

EC 2-10. Methods of advertising that are subject to the objections stated above should be and are prohibited. However, the Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone

directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.

EC 2-11. The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such. For many years some

law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not mislead thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be

removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13. In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representations of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC 2-14. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not

be permitted to hold himself out as a specialist or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

EC 2-15. The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans

which aid in the selection of qualified counsel.

EC 2-16. The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

DR 2-101. Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories,

city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animnations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may

not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and

memberships in such associations and societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether precentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the

total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

DR 2-103. Recommendation of Professional Employment.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment

resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 3-103(D) (1) through (5), to the extent and

under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistnce organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in ligitation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 13 1984
ALEXANDER L. STEVAS
CLERK

CASE NO. 83-2166

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER
Appellant,

vs

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee,

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLEE

ANGELO J. GAGLIARDO
Disciplinary Counsel for the
Supreme Court of Ohio
Counsel of Record

MARK H. AULTMAN
Office of Disciplinary Counsel
Staff Counsel

Office of Disciplinary Counsel
175 S. Third St., Suite 280
Columbus, Ohio 43215
(614) 461-0256

COUNSEL FOR APPELLEE

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43207

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

QUESTIONS PRESENTED*

1. May a state, in order to further its substantial state interest in regulating the legal profession and protecting the public, prohibit an attorney from running a newspaper advertisement, irregardless of the accuracy of the statements made therein, which conveys information concerning a particular product alleged to be defective, including medical information concerning which the lawyer may have no expertise, and which solicits persons who may have used the particular product to be represented by the attorney?

2. May a state, in order to further its substantial state interest in regulating the legal profession, and to protect members of the public who are not familiar with contingent fee agreements, (a) prohibit the advertising to the public of offers to represent persons on a contingent fee basis, where the public is not informed to the likely costs and other limitations of the contingent fee agreement, and (b) prohibit as misleading the advertisement of contingent fees in criminal cases where attorneys are not permitted to charge contingent fees in such cases?

3. May a Federal Court, consistent with the Tenth Amendment to the United States Constitution and with considerations of comity, require that a state in a judicial proceeding of that state, give notice of a charged violation other than the facts constituting the violation and the rule violated thereby, or prohibit a state Supreme Court from taking action based upon judicial notice of matters commonly occurring in its courts of inferior jurisdiction?

*There are no parties to this proceeding other than those listed in the caption.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v
STATEMENT OF FACTS CLARIFYING APPELLANT'S STATEMENT 1
SUMMARY OF ARGUMENT 3
ARGUMENT
I A LAWYER MAY BE DISCIPLINED FOR THE VIOLATION OF A DULY PROMULGATED RULE, EVEN IF THAT RULE IS ULTIMATELY FOUND TO BE UNCONSTITUTIONAL, WHERE HE KNOWINGLY VIOLATES THAT RULE, WITHOUT HAVING TAKEN STEPS TO HAVE THE CONSTITUTIONALITY OF THE RULE DETERMINED BY A COURT OF LAW 4
II THE DISCIPLINARY RULES ADOPTED BY THE SUPREME COURT OF OHIO ARE STATE LAW AND ARE ADOPTED OUT OF A NEED TO REGULATE CONDUCT FOR THE PROTECTION OF ALL CITIZENS 5
III ALL ADVERTISING IS EITHER IMPLICITLY OR EXPLICITLY, SOLICITATION, AND LAWYERS MUST, IN THE ABSENCE OF A CLEARLY CONTROLLING FEDERAL CONSTITUTIONAL RIGHT TO THE CONTRARY, ABIDE BY THE RULES CONCERNING SUCH MATTERS PROMULGATED BY DULY AUTHORIZED STATE AUTHORITY 6
IV THERE ARE SUBSTANTIAL STATE AND COMMUNITY INTERESTS FURTHERED BY RULES PROHIBITING SOLICITATION BY ATTORNEYS THAT ARE NOT PROTECTED BY A PROHIBITION LIMITED TO "FALSE AND MISLEADING" COMMUNICATIONS 11
V THE STATE OF OHIO HAS A SUBSTANTIAL STATE INTEREST IN ITS SYSTEM OF PROFESSIONAL REGULATION OF ATTORNEYS AND MUST TAKE INTO ACCOUNT THE REASONABLE EXPECTATIONS OF BOTH ATTORNEYS AND THE PUBLIC IN PROMULATING RULES INCIDENT TO THAT REGULATION 15
VI THE COMMUNICATION OF INFORMATION CONCERNING CONTINGENT FEES MAY BE REGULATED BY THE STATE IN THE INTEREST OF ENSURING THAT CONSUMERS OF LEGAL SERVICES RECEIVE ACCURATE INFORMATION 18
VII THE USE OF ILLUSTRATIONS IN ATTORNEY ADVERTISING MAY RATIONALLY BE PROHIBITED BY THE STATE ON GROUNDS, SUCH AS CONFUSION, OTHER

THAN THAT THEY ARE FALSE OR MISLEADING 20
VIII WHERE A PERSON IS GIVEN NOTICE OF A RULE AND CONDUCT WHICH IS ALLEGED TO VIOLATE THAT RULE, THERE IS NO VIOLATION OF DUE PROCESS MERELY BECAUSE THE LEGAL THEORY UPON WHICH THE RULE IS BASED IS INCONSISTENT OR CHANGES 26
IX APPELLANT COULD AND SHOULD HAVE SOUGHT A LEGAL DETERMINATION AS TO DISCIPLINARY RULES HE BELIEVED TO BE UNCONSTITUTIONAL RATHER THAN VIOLATE THOSE RULES 30
CONCLUSION 33
CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

CASES **PAGE**

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 7, 17
Central Hudson Gas & Electric Corp. v. Public Service Commissions, 447 U.S. 557 (1980) 11, 12
Committee on Professional Ethics v. Humphrey, 355 NW 2d 565 (Iowa, 1984) 12, 25, 30
Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44 (1984) 17
District of Columbia Court of Appeals v. Feldman, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983) 31
Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980) 31
Koffler v. Joint Bar Association, 412 N.E. 2d 927 at 931 6
In the Matter of Felmeister, 471 A. 2d 775 (N.J., 1984) 4, 25, 30
In Re Primus, 436 U.S. 412 (1978) 9, 34
In Re RMJ, 455 U.S. 191 (1982) 6, 7, 11
In Re Ruffalo, 390 U.S. 544 (1968) 27
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) 31
Ohio State Bar Association v. Weaver, 41 Ohio St. 2d 97 (1976) 28
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 9
Spencer v. Justices of the Pennsylvania Supreme Court, 579 F. Supp. 880 (E.D. Pa. 1984) 31
Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 5
Younger v. Harris, 401 U.S. 37 (1971) 31
Zimmerman v. Grievance Committee of Fifth

Judicial District, 726 F 2d (1984) 31

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

United States Constitution, Tenth Amendment 32

Disciplinary Rules of the Code of Professional Responsibility
DR 1-103 (A) & (B) 16
DR 2-101 (A) 29
DR 2-101 (B) 2
DR 2-101 (B) (15) 19
DR 2-102 6
DR 2-106 (C) 19, 27

Rules for the Government of the Bar of Ohio
Gov. Bar Rule V (2) 28
Gov. Bar Rule V (15) 28
Gov. Bar Rule V (16) 28
Gov. Bar Rule V (17) 28
Gov. Bar Rule V (20) 28

CASE NO. 83-2166

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER
Appellant,

vs

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee,

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLEE

STATEMENT OF THE CASE CLARIFYING APPELLANT'S STATEMENT

Appellant's Statement of Facts, Charges, and Evidence is substantially accurate, though in need of clarification. Appellant was indeed interested for a substantial period of time in running a Dalkon Shield advertisement, contacted Appellee several times concerning it, and had inconclusive meetings concerning it. What Appellant means by the statement "implicit approval of Appellee" to run the ad, however, we can only conjecture, since there is no mechanism by which Appellee can give prior approval for attorney con-

duct—particularly when that conduct is a clear violation of rules having the force of law, and promulgated by the highest court in the State of Ohio.

What Appellant means by the "principal focus" (p. 6) of the complaint and of the hearing can likewise only be conjectured, since the complaint, particularly the amended complaint, involves considerably more than the question of Appellant's Dalkon Shield advertisement as a violation of DR 2-101 (B).

While Appellant's statement—that the Panel initially treated much of Appellant's testimony and exhibits as a proffer—see page 52 of the transcript—is true, Appellant does not point out the testimony and exhibits were not "proffered" before a third party before being provided to the trier of fact, but were presented directly to the trier of fact, treated in Appellant's closing argument as evidence, and have been part of the record as if they had been initially admitted as evidence. While Appellee pointed out (Tr. 67) that it was placed at a disadvantage by such a procedure, Appellee does not believe that the treatment of the evidence as a "proffer" is now a relevant issue, except that it permitted the *de facto* introduction of testimony that was irrelevant to the issue before the Panel. Hearing Panels in the state of Ohio are made up of practicing attorneys, and do not have the authority to declare a rule duly enacted by the State's highest court to be unconstitutional. This is a judicial function which cannot be delegated to nonjudicial officers.

Appellee has never denied the first two statements which Appellant's brief states (at page 10) that he was attempting to prove at the hearing: 1) There were substantial benefits to Appellant's clients, and thus the public, as a result of this advertisement, and 2) Illustrations are a highly useful means of communication and were particularly useful (though they were illegal) here. Nor does Appellee disagree

that there are potential benefits to be gained for many lawyers from increased lawyer advertising. It is just that there are also substantial disadvantages which, given Ohio's interests in protecting its citizens from unwarranted litigation, and providing for the effective regulation of its legal profession, outweigh the potential benefits.

Appellant's statement in his brief (P. 15) that the Dalkon Shield ad was placed "without any intention to violate the Rules" is unrealistic. In his letter of December 1, 1981 (J.A. 43) Respondent stated he had familiarized himself with the Rules and there is no doubt, from his numerous communications with Appellee, that he knew of the rules. The most that Appellant can possibly mean by these statements is that he knew his conduct violated duly promulgated rules, but that he believed the rules to be unconstitutional.

SUMMARY OF ARGUMENT

Appellant has violated duly promulgated state laws which have been enacted for the protection of all citizens. The State of Ohio has a substantial state interest in regulating the legal profession for the benefit of the public and in enforcing rules designed to prevent, inter alia, the bringing of non-meritorious lawsuits against persons who might be sued by lawyers who solicit clients. Incident to that regulation it may impose requirements concerning information to be disclosed regarding contingent fees, and in order to prevent confusion may prohibit the use of most illustrations in advertisements by attorneys. Due process does not require that a person be given notice of the legal theory which underlies a rule. A person, particularly an attorney, who disagrees with a rule should seek a legal determination as to its validity rather than violate the law.

ARGUMENT

I. A LAWYER MAY BE DISCIPLINED FOR THE VIOLATION OF A DULY PROMULGATED RULE, EVEN IF THAT RULE IS ULTIMATELY FOUND TO BE UNCONSTITUTIONAL, WHERE HE KNOWINGLY VIOLATES THAT RULE, WITHOUT TAKING STEPS TO HAVE THE CONSTITUTIONALITY OF THE RULE DETERMINED BY A COURT OF LAW

The proper procedure, especially for a lawyer, where state laws are thought to be unconstitutional by reason of the federal constitution, is to challenge those laws, usually by an action for declaratory judgment, in federal, or sometimes in state, court. It is not to violate the law. *Matter of Felmeister,* 471 A 2d 775 (N.J. 1984). Appellant, a lawyer, chose to violate the law, rather than bringing a challenge in a court proceeding by which its validity could have been determined.

There are many areas of professional conduct subject to regulation that are *malum prohibitum* rather than *malum in se.* These include most rules concerning advertising, solicitation, ownership of practice, law firm structure, and the maintenance of trust accounts. It is not determinative, in considering violations of these rules, that an attorney did not "intend" to do anything that is wrong in itself. Where an attorney knows of the existence of a rule, and takes action which violates that rule, it is the intention to undertake the action which is known to violate the rule that is determinative, and not some other intention to do wrong. There is no doubt that Appellant knew he was violating a rule duly promulgated by the Ohio Supreme Court. He simply thought that it should not be the rule. He may, under the principle announced in *Felmeister,* and irrespective of an

ultimate ruling on the constitutionality of the rule, be disciplined.

II. THE DISCIPLINARY RULES ADOPTED BY THE SUPREME COURT OF OHIO ARE STATE LAW AND ARE ADOPTED OUT OF A NEED TO REGULATE CONDUCT FOR THE PROTECTION OF ALL CITIZENS

The Disciplinary Rules adopted by the Ohio Supreme Court are Rules of general application, are statutory in character, and are adopted out of a need to regulate conduct for the protection of all citizens. *Supreme Court of Virginia vs. Consumers Union,* 446 U.S. 719 (1980), at 731.

In 1969 The American Bar Association promulgated the Code of Professional Responsibility with a preface which contained the following statement:

> The Disciplinary Rules, unlike the ethical considerations are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

The preface to the Code of Professional Responsibility was not adopted by the Ohio Supreme Court when it adopted the remainder of the Code effective October 5, 1970, 23 Ohio St. 2d 1. It was specificially adopted by the Court, however, effective July 15, 1974, at 38 Ohio St. 2d p. xxv. The Disciplinary Rules of the Code of Professional Responsibility thus have the force of law in Ohio and are statutory in character. Since this Court's decision in the *Supreme Court of Virginia* case, *supra,* it is no longer possible to believe that Disciplinary Rules are voluntary codes of conduct to which attorneys may choose to adhere or not.

Attorneys who violate the Disciplinary Rules of the Code, once they have been adopted by state courts, are violating state law, which states have a substantial interest in enforcing, and concerning which states cannot be put to the burden of "proving", in actions brought to enforce those laws, the legislative facts which might establish their constitutionality.

III ALL ADVERTISING IS EITHER IMPLICITLY OR EXPLICITLY, SOLICITATION, AND LAWYERS MUST, IN THE ABSENCE OF A CLEARLY CONTROLLING FEDERAL CONSTITUTIONAL RIGHT TO THE CONTRARY, ABIDE BY THE RULES CONCERNING SUCH MATTERS PROMULGATED BY DULY AUTHORIZED STATE AUTHORITY.

It is not possible to consider attorney advertising as something separate and apart from solicitation. The issue raised by attorney advertising is the extent to which attorneys may, through advertising, solicit clients. The issue is not whether they may solicit, since as one court has said "(A)ll advertising either implicitly or explicitly involves solicitation". *Koffler vs. Joint Bar Association,* 412 N.E. 2d 297 at 931.

The advertisements which this court considered in *In Re RMJ,* 455 US 191 (1982), concern only the more limited type of advertising wherein an attorney advertises information concerning the attorney's personal qualifications and particular areas of law in which the attorney practices. (It also briefly considered the mailing of an office opening announcement but that is not advertising or solicitation as is normally contemplated by the Code of Professional Responsibility, which covers law office announcements in a separate rule (DR 2-102) from that covering solicitation or

advertising.) The information in the *Bates* advertisement was information that may be communicated to the public in general and does not depend for its effect upon its being communicated to any one recipient with a particular legal problem. Neither *R.M.J.* nor *Bates v. State Bar of Arizona,* 433 US 350 (1977), concerned an advertisement which solicited clients to sue an already known defendant for conduct already thought to have occurred, and which conveyed medical information in which lawyers have no expertise.

The particular medium of communication used is not determinative as to whether an advertisement constitutes impermissible solicitation. Modern communications and research techniques have made possible the development of mailing lists which can target particular groups to receive information in different ways. Thus it is possible to target mailings and other communications either directly, or through publications of established circulation, to persons known to have particular interests or needs. There is no longer sufficient meaning to the term "general circulation", as applied to modern communications, to permit that to be used as the relevant standard in determining where advertising crosses over the line of simply informing the public of one's credentials and availability to practice in a particular area of law, to the other side of the line that constitutes soliciting clients to come to the attorney to be represented in a particular matter.

Currently pending before the Board of Commissioners on Grievances and Discipline of the State of Ohio, the Supreme Court of Ohio, or other courts in which Appellee is a party, are cases which involve various means of using communications that could be referred to as "advertising" in one form or another, to solicit clients. These include cases in which it is either alleged or established that attorneys reviewed court dockets to find potential clients who

might reasonably benefit from bankruptcy proceedings, reviewed court dockets to determine potential clients who might need representation concerning the suspension of their driving licenses, and set up corporations purporting to be independent of the attorneys for the purpose of having the clients referred to them, and then solicited clients, usually by direct mail.

These cases by no means exhaust the possibilities by which attorney advertising may be used to solicit clients. Attorneys can contact people personally, have others do so, use mail, hand delivery, telephone, radio, or television. Printed matter can be personally delivered, delivered by others, mailed, or communicated electronically as through cable television or computers. Attorneys can mail printed matter to all homes in an area, particular addreses in which particular people, chosen by preselected criteria, are known to reside, or to particular neighborhoods or cities known to contain a significant concentration of potential clients. Attorneys can deliver or mail letters seeming to be personally addressed, or seeming to be general advertising circulars, to particular occupants using computerized mailing lists. Attorneys can place advertisements directly addressed to particular persons or particular groups of persons thought to be in particular need of legal services in periodicals specifically directed to those kinds of persons, or place advertisements directed to (and even naming) particular persons or groups of persons known to need particular services, in regularly published newspapers (either in the classified section or in other advertisements). Attorneys can place advertisements, in any of these media, inviting people to sue corporations, governments, or other entities known to have a particularly deep pocket and informing readers of the conduct concerning which they wish to sue. Attorneys can use statistical and research techniques, or more prosaically, look at court dockets to determine who is being sued, has

financial difficulties, is threatened with license suspension, or might otherwise be particularly susceptible to a suggestion of a need for legal services.

In none of these instances is the particular medium of communication chosen the determining factor as to whether the attorney has solicited clients. Any time an attorney says anything more than general statements concerning qualifications, kinds of cases handled, and fees and other related general information, and particularly, any time the attorney conveys information concerning a particular course of conduct or product made by a particular manufacturer or potential defendant, he has crossed over the line that is simply advertising which distinguishes one attorney from another attorney (solicitation based upon the attorney's qualifications) and has instead solicited clients for a particular case. If solicitation is permitted (which it is by virtue of advertising being permitted), and unless all solicitation is permitted, there must be some standard to separate permitted solicitation from unpermitted solicitation.

It is clear that in-person solicitation may be prohibited by the State. *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978). It is also clear that solicitation undertaken for political purposes, where there is no opportunity for pecuniary gain by the attorney, may not be prohibited by the state. *In Re Primus,* 436 U.S. 412 (1978). The relevant distinction between these two cases is not whether the solicitation was in-person solicitation (since both were) but whether the solicitation was undertaken for purely political reasons, with no possibility for pecuniary gain on behalf of the attorney. In both cases there was a *possibility* of overreaching, since the lawyer communicated directly with the person sought to be represented.

The standard currently recommended by the American Bar Association for distinguishing permissible solicitation from impermissible solicitation (which Appellant has at-

tached to his Brief at Addendum, page 2) is unreasonable and unenforceable. Appellant has admitted in his testimony in this case that one of his motivations in placing the advertisement was pecuniary and he has been retained by a substantial number of clients as a result. "Pecuniary motivation", however, certainly with respect to any attorney in private practice, is an impossible standard to apply in solicitation cases. It is impossible to distinguish pecuniary motivation from nonpecuniary motivation in any situation in which an attorney personally receives some compensation for representing a party, and any standard such as "significant motive" for "pecuniary gain" is not only unrealistic, but flies directly in the face of this Court's reasoning in "commercial speech" cases, which imply that it is precisely that pecuniary motivation that is being protected.

More importantly for this case however, the standard concerning advertising/solicitation that is now recommended by the American Bar Association is not the law in Ohio. That standard is contained in a set of Model Rules promulgated by the American Bar Association which has, as of this writing, been adopted in only two states, and even then, only with major and inconsistent (as between the two states) changes in some of the most important rules contained in that Code. The rule regulating solicitation contained in that Code is not, in fact, the one that was recommended, for several years, by the Committee that developed that code, but was, rather, inserted at the last moment, apparently with very little thought. In any event, since it so clearly disregards this court's reasoning in commercial speech cases by making pecuniary gain the determining standard in solicitation cases, there is no reason for this Court, or the State of Ohio, to expect it to become an acceptable and enforceable standard, or to make any decision on the assumption that it will be.

The State of Ohio's rules regarding advertising and solici-

tation are not unreasonable or unusual rules. Ohio's advertising rule, by the testimony of Appellant's expert witness (Tr. p. 110, 113) follows the approach taken in a majority of states. The State of Ohio's determination to enforce rules which are basically similar to the rules in a majority of other states is not unreasonable.

IV THERE ARE SUBSTANTIAL STATE AND COMMUNITY INTERESTS FURTHERED BY RULES PROHIBITING SOLICITATION BY ATTORNEYS THAT ARE NOT PROTECTED BY A PROHIBITION LIMITED TO "FALSE AND MISLEADING" COMMUNICATIONS

The standard of "false and misleading" is not a sufficient regulatory standard for attorney advertising/solicitation. The legal profession is not comparable to the drug industry, the medical profession, nor the gas and electric industry involved in *Central Hudson Gas and Electric Corporation v. Public Service Commission,* 447 U.S. 557 (1980). As this court stated in *RMJ* (455 US at 203):

> (T)he Central Hudson formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services affect opportunities to mislead and confuse that are not present when standardized products or services are offered to the public.

Thus this court has recognized that it is legitimate, in the regulation of attorney advertising/solicitation, to consider whether the advertisement is not just false or misleading, but confusing. The communication of information that is confusing can be just as much a danger to the public as the communication of information that is false and misleading.

In neither event can the recipient of the information act upon the information to protect his or her own interests. The State of Ohio thus may, in promulgating rules for the regulation of the bar, consider whether the particular advertisements (such as advertisements offering to represent clients for contingent fees) provide sufficient information to permit potential clients to make rational, informed decisions.

The *Central Hudson* test cannot be applied to the legal profession without taking into account the way the legal profession differs from, not just other advertisers, but other professions. The testing of drugs is subject to rigorous scientific scrutiny by which standards can be developed to determine if statements concerning those drugs can reasonably be considered to be false, misleading, or confusing. Statements of law and of legal facts relevant to legal issues, on the other hand, are almost always debatable, and cannot, like most statements concerning drugs, be verified or disproven, within tolerable limits, in a laboratory.

Nor is the legal profession akin to a public utility providing gas and electricity. When applying the tests of *Central Hudson* to determine whether a regulatory standard is more extensive than necessary to accomplish objectives, one cannot operate on the assumption that lawyers are part of a great social laboratory in which it is possible to conduct experiments that will provide evidence of how one might follow a "less restrictive path". "The professional disciplinary system would be in utter chaos if violations could be defended on the ground the lawyer could think of a better rule." *Committee on Professional Ethics v. Humphrey*, 355 NW 2d 565 (Iowa, 1984) at 569.

Nor can the legal profession be reasonably compared to the medical profession in determining the extent to which attorneys should be permitted to solicit through advertising. Doctors have particular patients whose health is at

stake. One may reasonably argue that a doctor owes paramount duty to the patient to save the patient's life, especially inasmuch as there will not be normally a threat to the life of other patients. Attorneys who are soliciting clients are not in the same situation. Attorneys operate in an adversary system where there will be an opposing party who will be sued if an attorney solicits a client to bring suit. Rules prohibiting solicitation protect third parties, some of whom are innocent and some of whom are not, from lawsuits that an attorney may have a substantial pecuniary interest in bringing.

If rules regarding solicitation through advertising protect, inter alia, those who might be otherwise unjustly sued by clients so solicited, the State of Ohio should not be compelled to experiment with its citizens' reasonable expectations that attorneys will not stir up litigation against them in order to provide "evidence" that its rules for regulating the legal profession are constitutional.

In the instant case Appellant was very much aware of both the particular company which was to be sued and the particular conduct with respect to which he wanted to sue that company. Neither the Appellee nor the Supreme Court of Ohio have attempted to justify that company's conduct or to suggest that company did not deserve to be in litigation for the conduct in which it engaged. The Stipulations, quite to the contrary, make absolutely clear that none of the parties in this action had any interest or desire to defend or justify the actions of the company.

The problem with Appellant's conduct in soliciting clients to sue this particular defendant, however, is that not all defendants and potential defendants will have engaged in conduct such as that engaged by the company. Some attorneys may wish to solicit clients for the purpose of suing the government for its role in the production and utilization of Agent Orange, for the purpose of suing manufacturers

for damage that has been caused as a result of asbestos, or for the purpose of suing operators of coal mines or other companies that allow dangerous or unsafe conditions to exist in the workplace. Others may wish to sue companies who have dumped toxic wastes, the owners of land upon which toxic waste is located, or perhaps the government agency given by statute the responsibility of providing for the cleaning up of those toxic wastes. In all of these situations there may be some valid social reason to want to encourage the solicitation of clients for the purpose of bringing suits against these particular defendants. Not all defendants or potential defendants, however, are the manufacturers or users of dangerous products, the maintainers of toxic waste dumps, or profiteers maintaining unsafe conditions at the cost of their employees' health.

Attorneys could also, if they may, under the rationale of a general constitutional right to solicit clients for the reasons of commercial speech, solicit clients for the purpose of bringing suit against their next door neighbor for letting water run off into their yard, for the purpose of suing one's partner in business, for the purpose of suing a spouse for divorce or to obtain child custody, for the purpose of suing one's employer for violations of civil rights, for the purpose of suing the local school administrators because many of the students who are being graduated from the schools are incapable of reading or writing according to minimally acceptable standards, or for the purpose of suing newspapers or reporters because they have made statements which appear to be libelous. Not all of these claims would be meritorious, but if there is a factual basis and applicable law that is reasonably debatable, then prohibitory standards such as false, fraudulent, or misleading (or even confusing) would be insufficient to prevent abuse of the process by lawyers who stand to make a profit by it. Given the diversity, size, and economics of the modern legal profession

(there are now, by most estimates, over 700,000 lawyers in the country, 27,000 of them in Ohio) it is no longer reasonable to assume that all attorneys will voluntarily refrain from solicitation that goes too far.

If the solicitation of clients through advertising is going to be permitted in case of a large company that has almost certainly done substantial damage to the clients being solicited, then neither a proscription against in-person solicitation, nor a requirement that the solicitation be limited to publications of general circulation, will protect those other parties, some of whom will be guilty or some of whom will be innocent, against whom attorneys will have a financial incentive to bring suit.

There is no enforceable legal standard that can be set up to provide that attorneys may solicit clients to sue only the guilty but not the innocent. Unless there is some rational, principled basis, consistent with the federal constitution, for drawing appropriate distinctions between suits that a reasonable public policy would wish to encourage by permitting solicitation, and suits which a reasonable public policy ought to discourage by prohibiting solicitation, then this Court should hold that state regulations prohibiting solicitation, at least as applied to solicitation to sue a particular defendant for conduct already thought to have occurred, whether undertaken by advertisements in newspapers of general circulation or otherwise, are rational and ought to be upheld.

V THE STATE OF OHIO HAS A SUBSTANTIAL STATE INTEREST IN ITS SYSTEM OF PROFESSIONAL REGULATION OF ATTORNEYS AND MUST TAKE INTO ACCOUNT THE REASONABLE EXPECTATIONS OF BOTH ATTORNEYS AND THE PUBLIC IN PROMULGATING RULES INCIDENT TO THAT REGULATION

The State of Ohio has substantial and compelling state interest in regulating its legal profession so as to protect its citizens from unwarranted and excessive litigation. In order to accomplish this it is dependent upon the cooperation of numerous attorneys, both to report and gather information concerning attorney misconduct and to assist in the operation of its regulatory system for attorneys.

Neither the State of Ohio, nor any other state, has a system of professional regulation that is independent of the cooperation of the attorneys who are being regulated. In all states, whether its disciplinary apparatus is operated entirely by a professional staff or not, the disciplinary system is, by virtue of DR 1-103 (A) and (B) of the Code of Professional Responsibility, dependent upon information received from attorneys practicing in the state. Ohio's system of professional regulation is more dependent upon the effective cooperation of private attorneys than other state systems that rely entirely upon professional staffs for legal discipline. In Ohio complaints concerning professional misconduct may be initiated by local bar association members who must, upon the filing of the complaint, swear that they will be responsible for the prosecution of the action. The jurisdiction of these bar associations, except for advertising matters, is concurrent with the Disciplinary Counsel.

Ohio's Board of Commissioners is composed of seventeen (17) attorneys, only nominally compensated for their work, from different areas of the state and with different backgrounds and practices. It is, in theory, the entity involved in Ohio's legal disciplinary process that is most representative of the interests of the legal profession in the state. The members of that Board recommended that Appellant be indefinitely suspended from the practice of law.

The Ohio Supreme Court, in reviewing the matter, determined that the penalty recommended by the Board was too harsh given the lack of consensus and uncertainty concern-

ing standards of attorney advertising and solicitation at the national level. Nonetheless the Ohio Supreme Court did impose the minimum disciplinary sanction. Unless the State of Ohio, after having adopted rules recommended by professional organizations purporting to represent the interests of the legal profession and the public, should ignore clear violations of those rules, then the actions of the Ohio Supreme Court in imposing discipline, but reducing it to the minimum discipline allowable by law, was rational, and ought to be upheld.

Moreover, the Ohio Supreme Court specifically reviewed the question of the constitutionality of its Disciplinary Rules and found them to be constitutional. It said (*Disciplinary Counsel v. Zauderer,* 10 Ohio St. 3d 44 [1984] at 47):

> "These sections which the panel and board found had been violated by the respondent are constitutional provisions of the Ohio Disciplinary Rules as contained within the Code of Professional Responsibility."

If for any reason the Appellant has engaged in *any* conduct which is improper and for which he can be disciplined, the discipline imposed by the Ohio Supreme Court should be allowed to stand, even if one or all of the Disciplinary Rules he was found to have violated might be over-broad if applied to other persons in different circumstances. *Bates v. State of Arizona,* 433 U.S. 350 (1977), at 381.

The Ohio Supreme Court has imposed the minimum discipline which can be imposed on an attorney for professional misconduct. Thus if it was improper for Respondent to advertise for a contingent fee in a criminal case, *or* if it was improper for Respondent to advertise the availability of a contingent fee without including qualifications for other expenses which might be incurred by a client, *or* if it was

improper for Respondent to solicit through newspaper advertisements persons unknown to him to sue a particular defendant who was known to him for a particular conduct which was known to him, *or* if it was improper for Respondent to place an advertisement which he did place in clear violation of the Disciplinary Rule governing advertising by attorneys in Ohio, the discipline imposed by the Ohio Supreme Court should stand. Only if the Respondent could not have been disciplined for *any* of the violations for which he has been disciplined should this Court order that his discipline be reversed.

VI THE COMMUNICATION OF INFORMATION CONCERNING CONTINGENT FEES MAY BE REGULATED BY THE STATE IN THE INTEREST OF ENSURING THAT CONSUMERS OF LEGAL SERVICES RECEIVE ACCURATE INFORMATION

Contingent fees are subject to abuse, since there may be no relationship between the amount of a fee paid and work performed. Nonetheless they are justified and necessary in the public interest in order to make possible the bringing of meritorious cases for which some clients might not otherwise have access to the courts. Contingent fees however, do not always serve the best interests of potential clients, and attorneys may be required to provide certain information concerning those contingent fees in order to protect the interests of potential clients and encourage informed decision-making concerning attorneys' services.

There is a public interest in ensuring that the public be adequately informed of the realities of contingent fee contracts. Members of the public cannot be presumed to know what is meant by "contingent fee." Most people would not know, for example, that under most contingent fee arrangements there can be substantial expenses incurred by the client. Any statement such as "if there is no recovery no legal fees" or "full legal fee refunded if convicted", the State of Ohio can rationally conclude, are misleading unless the essential terms of the agreement are conveyed to the public. It is not necessary to conclude by this that lawyers must specify in detail the terms and costs involved. At a minimum, however, the state may require that (1) potential clients not be left to believe that there are *no* costs involved if the client loses the case, and (2) attorneys not advertise that they are available to take criminal cases on a contingent fee basis when they may not legally do so.

Appellant's statement (at Brief, P. 41) that Ohio could, and possibly should, require that all contingent fee contracts be in writing and contain the information necessary to permit clients to make informed decisions is not a statement with which Appellee disagrees. The problem with the statement, however, is that it is not the law in Ohio, however desirable it might be, and attorneys have an obligation to abide by those rules that *are* law, not the ones they would prefer be the law.

Ohio's DR 2-101 (B) (15) requires that attorneys may advertise "contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses". The Ohio Supreme Court found that Appellant had violated this rule "by failing fully to disclose the terms of the contingent fee arrangement". Court costs and expenses, in complex medical litigation, could easily exceed two-thirds the costs of a recovery. It is possible, therefore, that a client could be entering into a contract in which expenses and lawyers' fees consume the entire recovery. Surely the state may require that potential clients be given this information. That the state may and probably should require more does not excuse Appellant's failure to provide

even this basic minimum of information.

VII THE USE OF ILLUSTRATIONS IN ATTORNEY ADVERTISING MAY RATIONALLY BE PROHIBITED BY THE STATE ON GROUNDS, SUCH AS CONFUSION, OTHER THAN THAT THEY ARE FALSE OR MISLEADING

The State of Ohio may rationally prohibit the use of illustrations other than the scales of justice or the attorney's picture. While the state may not do so on the grounds that all such illustrations are inherently misleading (as Appellant mistakenly states the State of Ohio has done), the state may rationally conclude that illustrations in attorney advertising are so inherently subject to abuse and manipulation through emotional or subconscious appeals as to be incapable of effective regulation through rational legal process. Appellant seems to be unable to accept the fact (at Brief, P. 34) that it is possible to use and abuse illustrations in advertising in such a way that they are not false and inherently misleading—as when advertisements are used to simply confuse, divert attention from important issues, or appeal to emotion or prejudice.

There is no doubt that a portrayal of the scales of justice, and a picture of a lawyer, do not convey much information to the public. But the purpose of most illustrations in advertising, as Appellant points out, is to get attention, not to convey information. The State of Ohio obviously has no compelling state interest in permitting attorneys to use the scales of justice, and pictures of themselves, in advertising. But the State of Ohio does not require that they do so, and so Ohio's exception of these two illustrations to its ban on illustrations is not relevant to Appellant's case.

The State of Ohio does not deny, and has never denied, that illustrations are useful in attracting attention to adver-

tisements. Nonetheless, Respondent introduced into evidence (proffered) at the hearing, over the objections of Relator, certain advertisements (JA 45, 46, 47, 48, 49, 50, and 51) placed by the Ohio State Bar Association. The Appellant has now designated them as Exhibits to be attached to the Joint Appendix in this case.

The Ohio State Bar Association was not, by those advertisements, soliciting clients—it was purporting to be acting for the interest of Ohio attorneys as a group. It could accept no employment as a result of these ads. As a private voluntary organization it had a perfect right to run these ads. It is not involved in the process of professional regulation of attorneys in Ohio (though local certified—usually county—bar associations are), and these ads should not have been viewed as either an implicit or explicit recommendation that individual attorneys should or may use similar ads.

Nonetheless, since Appellant has insisted that those advertisements are relevant, not only to the determination made by the Panel that Appellant's advertisement/solicitation violated Ohio's disciplinary rules, but to this Court's determination as to the constitutionality of Ohio's rules concerning advertising and solicitation, it is necessary to consider them in some detail.

The advertisements contained, by Appellants' designation, in the joint appendix do not indicate that such advertising ought to be permitted to individual lawyers, or that illustrations ought to be permitted in order to attract attention to advertisements. They merely indicate that illustrations do indeed attract attention, which no one has disputed.

A careful analysis of the advertisements, in fact, would more likely lead to the conclusion that the illustrations in the ads are precisely the part of them that is most objectionable. The first advertisement (J.A. 45) attracts our attention with a picture of a forlorn middle class gentleman who

is in jail. The limerick rhyme next to it tells us why: he ran a red light and was thrown in jail after entering a "no contest" plea. The number of middle class gentlemen who run red lights and are sentenced to jail for that offense is, in all probability, insignificant. Nonetheless, the predominant impression left by the ad is that, merely for running a red light you can easily wind up in jail, so you had better contact a lawyer. The impression created in the public's mind by the advertisement is one of unreasonable, perhaps unfair, judicial and police administration, from which one one's lawyer can save a person. The advertisement does convey (though not in the illustration or limerick) useful information. But both the illustration and the limerick, in order to attract attention and introduce humor into an (artificially created) fearful situation, create false impressions as to the likelihood of the supposed harm befalling the reader.

The advertisements at J.A. 50 and 51 use the same psychology of creating a fear in the reader, using humor to induce a sense of release of tension in the face of that fear, and suggesting that lawyers (some of whose association has sponsored the ad and thus induced this sense of relief in the presence of the fearful situation) can solve the problem for the reader. The advertisement at J.A. 50 shows a picture of the Leaning Tower of Pisa and suggests that a carefully drawn purchase agreement can protect the reader from latent (often undiscoverable) defects. But as most attorneys who have drafted such agreements know, this is precisely the area of law against which most real estate agreements do *not* provide protection.

The advertisement at J.A. 51 has a picture of a rather stern looking gentleman in glasses. Under the picture it states that "If you don't have a will, guess who could wind up with the kids. Uncle Harry." Uncle Harry, in this picture, is rather obviously intended to be someone who the

reader of the advertisement would not want to wind up with the kids.

All of these advertisements are relatively benign and show a sense of humor. Nonetheless, they appeal to the readers of the advertisement by playing upon fears which are communicated through pictures, but not articulated through rational mental processes.

These advertisements work on different psychological levels. The picture of the Leaning Tower plays on the fear of purchasers of real property that there may be hidden structural defects in the property. The advertisement concerning Uncle Harry appeals to the fear in parents that their children may, after they are dead, be brought up by persons who will not love and care for the children. Anyone with any experience in Probate Court knows that the chances of Uncle Harry ending up with the children are remote. Nonetheless the literal statement in the advertisement is accurate: Uncle Harry *could* end up with the kids. Thus the maker of the ad is able to say something that is literally true, but to use the picture to convey a misleading impression. The function of the illustration in the advertisement is to mislead, but to do it in such a way that it cannot be proven that anyone intended to mislead. The "Uncle Harry" ad won an award from the Midwest Region of the American Federation of Advertising because it did well what advertisers want to do: convey messages, without words, using images that appeal directly to the emotions, and bypass rational thought processes. Create a need, or fear, then suggest to the reader that the sponsor is able to fulfill or alleviate that need or fear.

These advertisements appeal to normal human fears to encourage the reader of the advertisement to believe that attorneys can solve the problems created by whatever it is (death and the prospect of one's children being left alone, latent defects in housing, unreasonable police or court ad-

ministration for minor traffic violations) that brings on these fears. Most of the fears to which these advertisements pander, however, are fears which exist in the normal course of everyday living and which cannot be removed, or to a large extent resolved, by attorneys. Most drivers are not going to be put in jail for running a red light, but the advertising concerning Fred perpetuates the fear that they may be. These advertisements are, in the subconscious appeals they make, misleading in some instances, and confusing in others, but since they do not purport to say anything serious, cannot be easily proven to be.

The fact that these advertisements are put out by a bar association is no reason for members of the legal profession to emulate or admire them. They do make it clear, however, that the use of illustrations in advertisements, by attorneys or by others, could not be limited or controlled for reasonable purposes. If attorneys may use the more sophisticated, and relatively benign, illustrations contained in these advertisements, it will be very difficult to prohibit the use of more direct and emotionally compelling images in attorney advertising. What, for example, will prohibit an attorney from publishing a picture of a grisly automobile accident and suggesting that either the manufacturer of the automobile or the party driving one of the vehicles might be sued? What will prohibit an attorney from publishing a picture of a doctor holding a human heart and saying: "Oops, I thought it was a kidney?", and inviting the reader to sue someone for malpractice?

At some point in the conveyance in such messages, it becomes irrelevant to consider whether the message being conveyed is false or misleading. If the message being conveyed is so overwhelming, or appeals so subtly to fears, biases or prejudices as to interfere with the normal processes and methods of communication for assimilating and acting rationally upon information, the state may conclude

that such information may be prohibited *in communications by lawyers designed to attract clients,* particularly where those communications are designed to encourage the reader of the message to bring suit against other parties.

The prohibition of most illustrations in attorney advertising/solicitation is not the same as prohibiting the use of such images in all communications to the public in general, nor the same as prohibiting the use of such images by lawyers where lawyers communicate the messages for purposes other than being hired by clients. Because of the nature of the legal profession, and because advertisements by members of the profession attract not only clients *for* whom the attorney is acting, but often result in a case *against* someone on the other side, the use of images that can be used to create or play upon fears may be prohibited.

The use of visual, non-verbal images in attorney advertising is validly restricted in other states because of the potential subliminal impact on the audience: *Matter of Felmeister,* 471 A 2d 775 (N.J. 1984), *Committee on Professional Ethics and Conduct v. Humphrey,* 355 N.W. 2d 565 (Iowa 1984). In *Felmeister* (at page 780), the court stated, with respect to broadcast advertising:

> Advertisers expect to achieve maximum persuasive effects from a fleeting exposure of the message sometimes with a potential subliminal impact on the audience. In radio and television broadcasting the volume, quality and intonation of voices can create ambiguities or convey nuances in meaning. Music, sound effects and dramatization are additional broadcasting techniques that may color the message to the listeners. These radio and television advertising variables, which convey subtle messages of their own, are difficult to monitor or even measure.

Any of several other standards that might be used to judge visual images that could be conveyed in advertising, such as whether the advertisement is dignified, tasteful, or as applied to illustrations or pictures, whether it is truthful or accurate, are inherently subjective and incapable of objective resolution through legal process. The State of Ohio prohibits the use of most illustrations in attorney advertising not because they are inherently misleading but because they can be so easily used to appeal to unconscious or subliminal fears and apprehensions in the public as to be incapable of effective regulation. Because of the unique nature of legal advertising as a communication that both attracts clients and encourages suits against other persons, the State of Ohio may rationally prohibit the use of illustrations.

Because Appellant's advertisement concerning the Dalkon Shield may have used its particular illustration to attract attention in a way that is more directly related to the information sought to be conveyed in the advertisement than does the Ohio State Bar Association advertisements, this does not justify Appellant's advertisement. That Appellant's advertisement is only a minor violation of a rule designed to prevent major abuses does not make it less a violation. It simply makes it a less compelling example than the Ohio State Bar Association advertisements of why the State of Ohio should have such a rule.

VIII WHERE A PERSON IS GIVEN NOTICE OF A RULE AND CONDUCT WHICH IS ALLEGED TO VIOLATE THAT RULE, THERE IS NO VIOLATION OF DUE PROCESS MERELY BECAUSE THE LEGAL THEORY UPON WHICH THE RULE IS BASED IS INCONSISTENT OR CHANGES

Appellant's argument concerning the drunk driving ad and Due Process ought to be rejected. Appellant's due process rights were not violated since he was given notice of a) the rule violated, and b) the facts (the placing of the advertising) which violated the rule. Due Process does not require a consistent theory as to *why* conduct violates a law —it requires only that a person be given notice of the facts constituting the violation and the law those facts are alleged to have violated. The due process violation in *In Re Ruffalo*, 390 US 544 (1968) was that the Board added another *count* after Respondent's testimony. Here, not only the counts, but the rules and applicable facts, have remained the same from the beginning of the hearing until now.

Trial courts of law are not college debating societies, nor are they forums for debating the legislative facts, or the rational bases, that underlie the enactment of a law. A person may be convicted of a speeding violation irrespective of whether the purpose of the law is to save lives or to conserve gasoline. A person charged with violating a law may make a record concerning constitutional *arguments* (which is different from evidence) in the trial court, and may make arguments concerning the constitutionality of applicable law in appellate courts, as Appellant is now doing. All due process requires is that he be given the opportunity to do so. In this instance Appellant was not only afforded that opportunity, but actually presented evidence, and argued about that evidence, to the trier of fact.

Appellant is correct in stating that the Appellee urged a different theory upon the Board of Commissioners than that used by the Board as to why Appellant's conduct in placing the drunk driving ad was deceptive. Appellee pointed out that DR 2-106 (C) prohibited contingent fees in a criminal case, and thus it was misleading to advertise to the public that Appellant was available to represent clients in criminal cases on a contingency basis. And Appellant is

correct in pointing out that the Board of Commissioners chose to proceed on a different theory—that is, that the advertisement was misleading because of the common practice of pleading to lesser charges.

But the Board of Commissioners does not, in Ohio's system of attorney grievance and discipline, impose discipline. It only recommends it. (Gov. Bar Rule V [2], and [15], Appendix A-4, A-16, Appellee Brief in Opposition to Jurisdiction.) The recommendation is filed with the Supreme Court (Gov. Bar Rule 16), a show cause order is issued (Gov. Bar Rule 17) and the Court reviews the matter (Gov. Bar Rule 20), and may impose discipline. These proceedings are *sui generis*, stemming from the inherent powers of the court to regulate the practice of law, *Ohio State Bar Association v. Weaver*, 41 Ohio St. 2d 97 (1976). Only the Ohio Supreme Court may impose discipline in Ohio.

The Supreme Court of Ohio has original jurisdiction in attorney disciplinary matters. (Appendix A-1, Appellee's Brief in Opposition to Jurisdiction.) Ohio Rule of Evidence 201 on Judicial Notice (A-30, Appellee's Brief in Opposition to Jurisdiction) provides that a "court may take judicial notice, whether requested or not". Appellee could not reasonably expect attorneys and judges in the State of Ohio not to know that drunk driving charges have frequently been subject to plea bargaining. Respondent's objection, then, is not to the fact of which judicial notice was taken, which is indisputable, but to the fact that the Board introduced this seemingly unrelated fact at the last moment in order to justify a finding of a violation of a rule.

But it is not the function of the Board of Commissioners to state why conduct found to have violated a clearly promulgated disciplinary rule is improper. It is its function to review the conduct and make an appropriate recommendation. The Ohio Supreme Court did, upon review of the matter, accept the Board's findings as to the Dalkon Shield

advertisements. (10 Ohio St. 3d at 47.) As to the drunk driving ad, while it repeated the Board's reasoning, it stated only that it agreed with the Board's conclusion that the ad was "misleading and deceptive" (10 Ohio St. 3d at 48), language which could incorporate either the Board's or Appellee's rationale as to why the rule violated DR 2-101 (A). Appellee, naturally, would prefer that the Court have clearly accepted its reasoning, but that is not the issue before this court. The issue is not whether the Court's action was wise, well articulated or instructive, but whether it was constitutional. If, by either rationale, the Supreme Court of Ohio could conclude that Appellant engaged in conduct (placing the advertisements) which violated its disciplinary rule 2-101 (A), then there was no deprivation of Appellant's rights to due process.

Moreover, it further appears from a review of the Ohio Supreme Court's opinion that it did not, as a result of its conclusion that the drunk driving ad violated DR 2-101 (A), impose any more discipline on Appellant than it would have in any event. The Court specifically noted, in fact, that Appellant had voluntarily withdrawn the advertisement and did not accept clients as a result, and stated that it would accordingly only impose a public reprimand.

In summary, Appellant was given notice of a rule he was alleged to have violated, and the facts constituting this violation. His objection that this violated his rights to due process thus is simply a restatement of his argument that he should be permitted to challenge the constitutionality of duly enacted law by introducing evidence tending to show facts that would bear upon the enactment of what he believes would be a better law. His objection, again, is simply that he does not like the law and believes he should be able to prove it is unconstitutional in whatever forum he chooses.

IX APPELLANT COULD AND SHOULD HAVE SOUGHT A LEGAL DETERMINATION AS TO DISCIPLINARY RULES HE BELIEVED TO BE UNCONSTITUTIONAL RATHER THAN VIOLATE THOSE RULES

Appellant seems intent—by his argument concerning a due process right to be notified of a particular legal *theory* and by his suggestion that *in a proceeding in which he is charged with violating a law* he has a right to introduce evidence concerning the "legislative facts" which might bear upon the wisdom of the law (as contrasted with a right to enter constitutionally based objections, on the record, so that he might later, as here, appeal the question of the law's constitutionality)—upon establishing the principle that the law governing attorneys is somehow not the law and that he can, if he disagrees with a law, violate that law.

This is tantamount to arguing that because he is an attorney, and might be able to think of a better law, he is thus somehow exempt from the law and ought not be punished for its violation. This would be an extreme argument even in those moral traditions that recognize a right to conscientious objection or civil disobedience, where it is generally acknowledged that though one may violate a law thought to be *unjust* (and not merely stupid or petty), one must be prepared to undergo punishment by civil authorities for having done so.

Lawyers, however, have a higher and special, not a lesser, duty to uphold the integrity of the law, and this Court should not accept the validity of Appellant's reasoning. Both the New Jersey Court in *Felmeister, supra,* and the Iowa court in *Humphrey, supra,* properly expressed alarm at this kind of reasoning, which, the Iowa court correctly pointed out (at page 569), would reduce the disciplinary system to "utter chaos".

It is clear, under the abstention doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982) that federal courts will not intervene (absent other factors) in ongoing state judicial proceedings to rule upon constitutionality of a law being enforced in these proceedings. Nonetheless it also seems clear, under the principles enunciated in *District of Columbia Court of Appeals v. Feldman,* 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) and *Zimmerman v. Grievance Committee of Fifth Judicial District,* 726 F 2d 85 (1984) that Federal courts will entertain challenges to rules for the regulation of the bar promulgated by state courts in non-judicial proceedings (as contrasted with challenges to state court decisions in ongoing judicial proceedings).

Thus the federal court in *Durham v. Brock,* 498 F Supp. 215 (1980), in an action seeking declaratory and injunctive relief, found a provision of the Tennessee Supreme Court which prohibited an attorney from advertising areas of practice to be unconstitutional. And thus a federal district court in *Spencer v. Justices of the Pennsylvania Supreme Court,* 579 F. Supp. 880 (1984) took jurisdiction to rule that some provisions of Pennsylvania's Code of Professional Responsibility concerning advertising and solitication were valid, and others were not.

Appellant in this case could have, in other words, gone into federal court to challenge the validity of the rule with which he disagreed, instead of choosing to violate the rule. Having a perfectly adequate remedy through which to determine whether the rule was constitutional, Appellant nonetheless chose to forego that proceeding and to violate the law. He now comes to this court, having been reprimanded for conduct that is clearly a violation of the Ohio Supreme Court's Code of Professional Responsibility, and asks that this court find that the federal constitution re-

quires that an attorney be permitted, *inter alia,* to use illustrations in advertisements soliciting clients, accept remunerative employment after soliciting clients to sue a particular defendant for conduct thought to have occurred, advertise that he will represent clients in both criminal and civil cases on a contingent fee basis without disclosing any of the details of the contract, and place advertisements containing information which clearly violates disciplinary rules duly promulgated by a state agency clearly authorized to promulgate such regulations.

It is not determinative, in deciding whether a rule violates the federal constitution, that it is questionable, unwise, badly drafted, inane, or brilliant, or whether there are several other rules which could be thought up by attorneys and which might, from one point of view or another, be better. We would hope, as attorneys, that the rules which are adopted for the governance of the legal profession would be wise, but the process by which they are generally drafted and adopted does not lend itself to that. Wise or not, however, where they are clearly the law, attorneys have an obligation to abide by them.

The Tenth Amendment to the U.S. Constitution provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people. Under this amendment, and principles of comity regarding state court decisions and state laws, federal courts should defer to state court decisions unless those decisions violate some clear federal constitutional right, or federal law in an area which the federal government has preempted. The federal government has not preempted the area of professional regulation of attorneys, and the responsibility for such regulation has fallen upon state courts. Given the increasing size, diversity, and litigousness of that profession, the task of professional regulation is one that can be extremely burdensome, and no

decisions which state courts make are likely to please everyone. Given the structure of professional regulation in this country, then, it is especially important that federal courts defer to state court decisions unless they conflict with some clearly articulated federal constitutional right.

CONCLUSION

While there is a federal constitutional right in commercial speech to advertise the qualifications of a lawyer and availability to practice in particular areas of law, there is not, from a review of this Court's decisions, any federal constitutional right to solicit clients to sue particular persons or entities (unless done under the auspices of a political organization as in *Primus*) and thus foment litigation that otherwise might not have occurred. The State of Ohio's disciplinary rules specifically forbid such conduct, and do not do so irrationally. While they could be overbroad as applied to other possible conduct by other attorneys, the State of Ohio could constitutionally discipline Appellant for the conduct in which he engaged. Appellant has been given the minimum discipline he can be given for a disciplinary violation. Accordingly, the discipline ordered by the Ohio Supreme Court should stand.

Respectfully submitted,

/s/
A.J. Gagliardo
Disciplinary Cousel

/s/
Mark H. Aultman
Staff Counsel

OFFICE OF DISCIPLINARY COUNSEL
175 South Third Street, Suite 280
Columbus, Ohio 43215
(614) 461-0256

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief have been served upon the Appellant's Counsel, Alan Morrison, Public Citizen Litigation Group, Suite 700, 2000 P Street, N.W., Washington, D.C., 20036, by United States mail, first class postage prepaid, on this ____ day of December, 1984. I further certify that all parties to be served have seen served.

/s/
A.J. GAGLIARDO
Counsel of Record for Appellee

Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF AMICUS CURIAE OF A. H. ROBINS COMPANY, INCORPORATED, NOMINALLY IN SUPPORT OF APPELLEE

E. BARRETT PRETTYMAN, JR.*
WILLIAM J. CASSIDY, JR.
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006
(202) 331-4685
Counsel for Amicus
A. H. Robins Company, Incorporated

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Amicus A. H. Robins Company, Incorporated, addresses in this brief the sole question of whether the Joint Appendix filed by the parties accurately presents certain facts relating to Amicus and the Dalkon Shield.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2166

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF AMICUS CURIAE OF A. H. ROBINS COMPANY, INCORPORATED, NOMINALLY IN SUPPORT OF APPELLEE

INTEREST OF AMICUS

A. H. Robins Company, Incorporated ("Robins"), is a pharmaceutical company headquartered in Richmond and incorporated under the laws of Virginia. Between 1971 and 1974, Robins manufactured and nationally marketed an intrauterine contraceptive device (IUD) known as the Dalkon Shield.

The appeal in this case centers upon the constitutionality of the imposition of sanctions upon the Appellant, Philip Q. Zauderer, for certain advertisements of his services as an attorney. The advertisement chiefly in question was directed to prospective plaintiffs who might

have causes of action against Robins for injuries allegedly caused by the Dalkon Shield.

Appellant's claim to have demonstrated the social utility of his acts rests, in part, upon the underlying assumption that the Dalkon Shield has been demonstrated to be a defective and unreasonably dangerous device. Robins appears in this appeal for the limited purpose of establishing that the matters contained in the Joint Appendix concerning the Dalkon Shield and Robins are mere allegations.

Robins has received permission from both parties for the submission of this brief.

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND RULE INVOLVED, AND STATEMENT OF THE CASE

We adopt the statement of the Opinions Below, Jurisdiction, Constitutional Provisions and Rule Involved, and Statement of the Case set forth by the parties except to the extent that the Statement of the Case is amended by the Argument below.

ARGUMENT

By engaging in defendant-specific advertising, Appellant occasioned the filing of litigation against Robins. Appellant now challenges the constitutionality of disciplinary actions against him based, in part, upon a claim that his advertising caused the filing of meritorious actions and also induced women to act to prevent injury. The underlying assumption is that the Dalkon Shield has been demonstrated to be defective and unreasonably dangerous. In fact, no such adjudication has been made in this case.

The parties filed a Joint Appendix in this Court on November 5, 1984. Beginning at page 9 of that document, there appears a "Stipulation of Fact Between Relator and Respondent" which recites that the parties "stipulate and agree that the following facts are true and can and should be treated as such by the Board [of Commissioners on Grievances and Discipline of the Supreme Court of Ohio]." JA 9. The Stipulation, in turn, relies upon certain alleged "facts" concerning Robins and the Dalkon Shield which were "found * * * to be true" by a retired District Court judge in another disciplinary case in Minnesota, *Matter of Discipline of Appert*, 315 N.W.2d 204 (Minn. 1981). The putative facts about the Dalkon Shield and Robins include statements to the effect that the IUD was defective and dangerous, known to be so prior to and after its sale, and marketed with the aid of misrepresentations by Robins. JA 19.

In fact, the matters recited in the Stipulation have never been determined in an adversarial context in this action or in the Minnesota action cited by the parties. Robins was not a party in the proceedings below, nor was it a party in the *Appert* proceedings in Minnesota. The "facts" offered by Appellant in support of his argument for the social utility of his advertising were not challenged, tested or opposed by any party to this action and were not the product of any adversial proceeding in the cited Minnesota action. The Appellee in the instant proceeding, for example, did not even attend the depositions of certain of Appellant's "expert witnesses". Brief of Appellant at 5.

That the "facts" allegedly found by the retired judge in the Minnesota action were never litigated and reflected only the contentions of the respondents therein is attested to by the declaration of the Minnesota Supreme Court in that very proceeding:

> We note initially that the statements concerning the activities of A.H. Robins Company made in this opinion are intended to reflect only the contentions of respondents to the disciplinary proceedings and are not indicative of any judicial determination of

these issues as it might affect A.H. Robins. A.H. Robins has never been a party to and did not present evidence concerning the allegations in these proceedings. [*Matter of Discipline of Appert*, 315 N.W.2d at 205 n.1.]

CONCLUSION

Insofar as Appellant's claim of unconstitutionality rests in any way upon his allegations that meritorious actions were filed against Robins and injury was prevented, we respectfully urge the Court to note the admonition of the Minnesota Supreme Court that these allegations "reflect only the contentions of the respondents * * * and are not indicative of any judicial determination of these issues * * *."

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
WILLIAM J. CASSIDY, JR.
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006
(202) 331-4685
Counsel for Amicus
A. H. Robins Company, Incorporated

* Counsel of Record

Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS
CLERK

No. 83-2166

IN THE
Supreme Court of the United States
October Term, 1984

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal From the Supreme Court of Ohio

REPLY BRIEF OF APPELLANT

Alan B. Morrison
(Counsel of Record)
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

THE CAPITOL PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

TABLE OF AUTHORITIES

Cases: **Page:**

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 2, 4, 9

Central Hudson Gas & Electric Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) 2, 5, 9

In re Primus,
436 U.S. 412 (1978) 6

In re R.M.J.,
455 U.S. 191 (1982) 2, 4, 5, 9

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 4

NAACP v. Button,
371 U.S. 415 (1963) 6

Village of Schaumburg v. Citizens for a Better Environment,
444 U.S. 620 (1980) 5

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 3

Other Authorities:

FTC, *Staff Report on Improving Consumer Access To Legal Services: The Case For Removing Restrictions on Truthful Advertising*,
(November 1984) 3

Ohio Civil Rule 11 5

Rule 11, Fed. R. Civ. P. 5

IN THE

Supreme Court of the United States

October Term, 1984

No. 83-2166

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal From the Supreme Court of Ohio

REPLY BRIEF OF APPELLANT

In defending the discipline imposed by the Ohio Supreme Court, appellee advanced nine separately numbered arguments in its brief. Several points can be grouped together, and others merit no reply. We set forth below our response to the remaining arguments of appellee.

1. At the beginning and end of its brief (Points I and IX), appellee observes that appellant did not challenge the rules under which he was found guilty for publishing his Dalkon Shield ad before he ran the ad, and that he "could and should have" gone to the federal court to test the constitutionality of those rules, rather than first publishing his ad. Presumably, although not stated expressly, appellee's conclusion is that "therefore appellant is precluded from raising his constitutional defense in this proceeding." If that is appellee's conclusion, it is plainly wrong; if it is not, its arguments are simply irrelevant.

The notion that appellant is "precluded" from relying on the First Amendment as a defense to these disciplinary charges is wholly refuted by this Court's decisions in *Bates v. State Bar of*

Arizona, 433 U.S. 350 (1977), and *In re R.M.J.,* 455 U.S. 191 (1982). In both of those cases the attorneys first engaged in the activities which violated the state's advertising rules and then successfully raised their First Amendment claims as defenses to disciplinary proceedings. Similarly, to the extent that appellee argues, as it does in the heading to Point III of its brief, and again on page 33, that attorneys must obey all rules "IN THE ABSENCE OF CLEARLY CONTROLLING FEDERAL CONSTITUTIONAL RIGHTS TO THE CONTRARY," that argument is also answered by those decisions.

Moreover, the argument overlooks the fact that appellant made repeated efforts to find out whether his Dalkon Shield ad was proper, and he believed, incorrectly as it turned out, that the disciplinary authorities would not act against him following this Court's ruling in *In re R.M.J.* (J.A. 15-16; T. 197-98, 208-12). Finally, when appellant met with members of appellee's staff, there was no hint that the portion of his Dalkon Shield ad dealing with contingent fees was a problem, nor is there any suggestion that he was advised before running his ad that the Disciplinary Counsel believed that his ad constituted improper solicitation. Thus, even if a preclusion argument might be proper in some case, it has no place in this one.

2. In a number of places, principally in Points II and IV, appellee observes that Ohio's Code of Professional Responsibility was adopted to protect the public. We agree. However, such "protections" must also pass muster under the requirements of the First Amendment, and neither appellee nor the Ohio Supreme Court seems to have recognized that this is not simply a question of whether the rules are reasonable, rational, or even wise or unwise, but whether they satisfy the four-part test for regulating commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980). And that test mandates that the State take into account the public's need for the information being suppressed.

Appellant recognizes that "selling" legal services is not the same as selling ordinary commercial products or services. But despite such differences, the central message of this Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976), seems to have been lost on appellee:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. *Cf. Parker v. Brown,* 317 U.S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense the justifications Virginia has offered for suppressing the flow of prescription drug information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

Thus, the particular vice of the rules under challenge on this appeal is that they fail to take any account of the genuine need that the public has for both general and specific information about the availability of legal services and possible solutions to problems that lawyers may provide.[1] Stated another way, these rules assume that, if any possible misuse can be made of information in an ad, the state may flatly prohibit it. That view, quite simply, is not consistent with the First Amendment.

---

[1] A recently issued Staff Report of the Federal Trade Commission provides further evidence that consumers benefit from lawyer advertising through lower prices and increased competition. FTC, *Staff Report On Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (November 1984).

Arizona, 433 U.S. 350 (1977), and *In re R.M.J.*, 455 U.S. 191 (1982). In both of those cases the attorneys first engaged in the activities which violated the state's advertising rules and then successfully raised their First Amendment claims as defenses to disciplinary proceedings. Similarly, to the extent that appellee argues, as it does in the heading to Point III of its brief, and again on page 33, that attorneys must obey all rules "IN THE ABSENCE OF CLEARLY CONTROLLING FEDERAL CONSTITUTIONAL RIGHTS TO THE CONTRARY," that argument is also answered by those decisions.

Moreover, the argument overlooks the fact that appellant made repeated efforts to find out whether his Dalkon Shield ad was proper, and he believed, incorrectly as it turned out, that the disciplinary authorities would not act against him following this Court's ruling in *In re R.M.J.* (J.A. 15-16; T. 197-98, 208-12). Finally, when appellant met with members of appellee's staff, there was no hint that the portion of his Dalkon Shield ad dealing with contingent fees was a problem, nor is there any suggestion that he was advised before running his ad that the Disciplinary Counsel believed that his ad constituted improper solicitation. Thus, even if a preclusion argument might be proper in some case, it has no place in this one.

2. In a number of places, principally in Points II and IV, appellee observes that Ohio's Code of Professional Responsibility was adopted to protect the public. We agree. However, such "protections" must also pass muster under the requirements of the First Amendment, and neither appellee nor the Ohio Supreme Court seems to have recognized that this is not simply a question of whether the rules are reasonable, rational, or even wise or unwise, but whether they satisfy the four-part test for regulating commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). And that test mandates that the State take into account the public's need for the information being suppressed.

Appellant recognizes that "selling" legal services is not the same as selling ordinary commercial products or services. But despite such differences, the central message of this Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), seems to have been lost on appellee:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. *Cf. Parker v. Brown*, 317 U.S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense the justifications Virginia has offered for suppressing the flow of prescription drug information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

Thus, the particular vice of the rules under challenge on this appeal is that they fail to take any account of the genuine need that the public has for both general and specific information about the availability of legal services and possible solutions to problems that lawyers may provide.[1] Stated another way, these rules assume that, if any possible misuse can be made of information in an ad, the state may flatly prohibit it. That view, quite simply, is not consistent with the First Amendment.

---

[1] A recently issued Staff Report of the Federal Trade Commission provides further evidence that consumers benefit from lawyer advertising through lower prices and increased competition. FTC, *Staff Report On Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (November 1984).

3. In the opening sentence of Point III of its brief, appellee states that it is "not possible to consider attorney advertising as something separate and apart from solicitation" (Br. 6). We agree that advertising is simply one way in which lawyers solicit business, but that does not provide an answer to this First Amendment challenge. For if all advertising is a form of solicitation, and since this Court has upheld for-profit "solicitation" in *Bates* and *R.M.J.*, then there is nothing *per se* objectionable about solicitation such that the mere incantation of the word takes the case out of the First Amendment.

To the contrary, as the decisions of this Court make clear, the proper inquiry is whether the type of conduct at issue is the kind which the state may properly prohibit because of the substantive harms to its citizens that may arise from it. And to answer that question, the courts must look at the rule allegedly violated and the conduct giving rise to the violation. Thus, as this Court did in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), a court must inquire into whether the potential harms appear likely, and should not speculate about what a state might or might not do in a vast array of cases not then before the court. Because the Dalkon Shield ad published by appellant involved none of the substantive evils which the state may properly prohibit, such as the in-person solicitation of a recent accident victim in a hospital condemned in *Ohralik*, it may not be the basis for disciplining him.

4. In its only effort to identify a substantial state interest which would justify these broad restrictions on advertising, appellee, for the first time in this litigation, argues that Ohio's chief concern is to "prevent . . . the bringing of non-meritorious lawsuits against persons who might be sued by lawyers who solicit clients" (Br. 3, 13). We do not dispute that deterring frivolous litigation is a valid state objective. However, for at least three reasons, this justification cannot support the discipline imposed on appellant or indeed any broad restrictions on advertising.

First, it is difficult to understand the basis for Ohio's conclusion that there is any correlation between the bringing of non-meritorious cases and the sort of advertising at issue here. Not

only is there absolutely no evidence in the record, or elsewhere for that matter, to support such a conclusion, but such a conclusion is at odds with the realities of contingent fee litigation, which typically turns on an attorney's assessment that there is a substantial likelihood of prevailing prior to the initiation of any legal action, or as appellee put it, whether "there is a factual basis and [the] applicable law [governing the case] is reasonably debatable . . ." (Br. 14). In any event, appellee's total failure to furnish any support for this alleged correlation is, standing alone, an adequate basis for the Court to reject this argument. *See In re R.M.J.*, 455 U.S. at 202, 204-205; *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. at 568-72; *cf. Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-639 (1980).

Second, appellee has failed to even attempt to meet its burden of proof and show that these prohibitions directly advance the goal of discouraging frivolous litigation. This is not surprising, however, since the advertising prohibitions go far beyond that goal and, as this case illustrates, would plainly deter meritorious litigation – such as the 95 Dalkon Shield cases filed as a result of appellant's ad.

Moreover, appellee overlooks the fact that the courts have ample, less sweeping tools at their disposal, which are directly aimed at combatting frivolous litigation. Suits for abuse of process and/or malicious prosecution are available where the facts warrant such charges. The courts of Ohio, as well as those in the federal system, have rules which provide sanctions for attorneys who bring frivolous actions. Ohio Civil Rule 11; Fed. R. Civ. P. 11. And surely Ohio could discipline any attorney who repeatedly filed actions adjudged to be vexatious or brought in bad faith. Given this clear ability to protect against lawyers who abuse the judicial process by direct, less restrictive, means, appellee's attempt to justify its sweeping advertising restrictions on these grounds must be rejected.

Finally, to the extent that appellee is suggesting that the First Amendment allows a lawyer to promote himself and state the areas of law in which he works, but does not allow him to advertise for clients for specific cases, with known defendants, that

argument is supported by neither logic nor authority. Thus, in *NAACP v. Button*, 371 U.S. 415 (1963), the solicitation for civil rights plaintiffs was quite specific, and in *In re Primus*, 436 U.S. 412 (1978), the solicitation was directed at finding plaintiffs to institute an action against a single doctor, yet this Court overturned the restrictions in both cases. Moreover, since consumers often rely on advertising to fill information voids, it turns the First Amendment on its head to say that the information in appellant's ad is entitled to less protection because it was *more* specific, and hence more useful to the reader, than a general ad announcing a lawyer's availability to handle personal injury cases arising from defective medical devices.[2]

5. Appellee also argues in Point IV that lawyer advertising should not only be judged by whether it is false or misleading, but also by whether an ad may be "confusing" (Br. 11). It is not at all clear what difference there is between those standards for constitutional or any other purposes. But, more importantly, appellee never attempts to demonstrate that the Dalkon Shield ad is confusing.

Nor could it have succeeded if it had tried. The illustration is admittedly accurate, the basic message about possible litigation over injuries resulting from using the Dalkon Shield is clear and not disputed, and the only aspect of the ad which the Ohio

[2]A.H. Robins Company, the manufacturer of the Dalkon Shield, has filed an *amicus* brief, purportedly to clarify the stipulated record in this case with respect to the allegedly defective nature of the Dalkon Shield. We will not recite the evidence demonstrating that the Dalkon Shield has been associated with a number of serious medical problems, but instead refer the Court to the Addendum of this brief, which sets forth a reproduction of a typical advertisement recently published by Robins as part of its massive media campaign to warn women still using the device that it "is important that each Dalkon Shield be removed, since there is substantial medical opinion that its continued use may pose a serious personal health hazard."

We also draw the Court's attention to the fact that in its efforts to assure that all women who are still using the Shield read and understand its advertisement, in which it offers to pay for medical treatment in removing the Shield, Robins used an illustration of the Shield, which appears to be virtually identical to the illustration used by appellant.

Supreme Court found objectionable is the portion relating to contingent fees. While appellant believes, for reasons set forth at pages 37-43 of his opening brief and in the following section of this reply, that those objections cannot be sustained under the First Amendment, appellee's argument based on possible confusion would add nothing to its existing defense of the finding of misconduct relating to the contingent fee portion of the Dalkon Shield ad. Accordingly, even if appellee were correct in its premise, the addition of "confusing" to the list of possible bases for imposing discipline could not justify the decision below.[3]

6. In his opening brief, appellant made two constitutional arguments regarding the charges that he made inadequate disclosures concerning his contingent fee arrangement. The first was that there was no evidence that there was any need for the kind of detailed affirmative disclosure requirement that the Ohio Supreme Court has imposed for all advertisements for contingent fee cases. As to that, appellee's only response has been to make broad and unsupported assertions in its brief on the desirability of such information:

> Members of the public cannot be presumed to know what is meant by 'contingent fee.' Most people would not know, for example, that under most contingent fee arrangements there can be substantial expenses incurred by the client (Br. 18-19).

There is simply no basis for such claims, either in the evidence or the findings of the Ohio Supreme Court. Indeed, appellee never even attempted to prove those assertions at trial. Nor is there any suggestion that any of appellant's clients were unaware of the full extent of their obligation at the time when

[3]As to the Dalkon Shield illustration, far from being confusing as appellee suggests in Point VII, the uncontested evidence is that the illustration was essential in catching the attention of the reader and in conveying the message that this particular IUD was the one which may have caused injuries to the women who had used it (T. 54-55, 176-79). In addition, one of appellant's expert witnesses testified that deleting the illustration "would probably make the written words confusing" (T. 162).

such information was most needed – when they entered into a fee agreement with appellant. Accordingly, the factual foundation for such an assertion cannot be sustained.

Appellant's second argument was that the affirmative disclosure requirement was ill-suited to combat any substantive abuses in the area of contingent fees which the state might lawfully control. In reply, appellee agreed with the criticism of Ohio's rules, but defended the decision below on the ground that "attorneys have an obligation to abide by those rules that *are* law, not the ones they would prefer to be the law" (Br. 19, emphasis in original). The difficulty with that argument, like so many others in appellee's brief, is that it has overlooked the fact that this is a First Amendment case and that under this Court's decisions such as *Bates, Central Hudson,* and *R.M.J.*, a far closer relationship between substantive goals and suppression of commercial speech must exist before the Ohio Supreme Court's disclosure rules on contingent fees can be upheld.

7. In its defense of the finding of misconduct on the drunk driving ad (Point VIII), appellee admits that the theory on which the Board found appellant guilty was different from the one on which appellee proceeded (Br. 27). Nonetheless, appellee argues that the decision can be upheld because appellant knew that his drunk driving ad was the subject of these charges and was advised of the rule on which the Board and Court relied. According to appellee, that is all that due process requires.[4]

However, there are several serious due process problems which were discussed in Point II of appellant's opening brief, to which appellee has not responded. This is not simply a case in which an attorney was advised of the conduct and the rule under which he was to be charged. Rather, the disciplinary authorities here explained in detail their theory of the alleged violation, both before and at trial (J.A. 23 ¶ 3; Tr. 14). By not even suggesting any alternative theory, appellee affirmatively led appellant to believe that the original theory was the only one on which he had to defend his drunk driving advertisement.

[4]Appellee's suggestion that the Ohio Court's finding that the ad was "misleading and deceptive" "could incorporate either the Board's or Appellee's rationale as to why the rule [sic] violated DR 2-101(A)" (Br. 22) is nothing but speculation, and as such is no answer to appellant's due process claim.

The problem that the change in theories produced here is far from being a theoretical one, but had real practical consequences to the defense. If appellant had known in advance the basis on which he was ultimately found guilty, he surely would have offered evidence regarding the actual practices at the Municipal Courts and the understanding of his advertisement by those who responded to it (and perhaps by experts and others). More importantly, appellant would have testified about his intentions concerning this ad, instead of having the Board find him guilty based upon its own speculations about what he would or would not have done in certain circumstances. While it is true, as appellee argues, that appellant was afforded the opportunity to present evidence and actually did so (Br. 27), it is equally true that he had no realistic opportunity to respond to the charge on which he was disciplined, as opposed to the one relied on by appellee.

There is a further problem to which appellee has made no response at all: the Board took judicial notice of what it claimed to be the practice at the Municipal Courts as the basis for a finding of attorney misconduct. The question in this Court is not, as appellee suggests (Br. 28), whether judicial notice in those circumstances was proper as a matter of Ohio law. Rather, the pertinent inquiry is whether the Due Process Clause allows a state to impose discipline on an attorney based solely on records which have not been offered in evidence, nor made available to the attorney, nor of which he was even apprised before his trial was completed. Indeed, to this day, appellant has no idea what "reports" the Board was describing, since even when his objection was clearly stated in his brief to the Ohio Supreme Court, no one filed with the Ohio Supreme Court, or even specifically identified, the "reports" which formed the basis of this charge. The Due Process Clause simply does not allow a finding of attorney misconduct based on such "non-evidence."

• • •

For the foregoing reasons, as well as those set forth in appellant's opening brief, the decision and order below should be reversed, and the charges of misconduct dismissed.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

December 1984

ADDENDUM

Advertisement of the A.H. Robins Company
November 7, 1984 *The Columbus Dispatch*

An Important Health Warning To Women Using An IUD

If you are still using an intrauterine birth control device (IUD) inserted in the early to mid 1970s, this message is for you. Many women had an IUD called the Dalkon Shield inserted during that time. It is important that each Dalkon Shield be removed, since there is substantial medical opinion that its continued use may pose a serious personal health hazard. If you are still using a Dalkon Shield, A. H. Robins Company will pay your doctor or clinic to remove it.

A. H. Robins ceased distribution of the Dalkon Shield in 1974. Many claims have been made that the device causes health problems, including pelvic infections, that may result in serious injury or death. In 1980, A. H. Robins advised doctors to remove the Dalkon Shield from any woman still using it. In 1983, the U.S. Food and Drug Administration and other government agencies issued the same advice based on their concern about pelvic infections among Dalkon Shield users.



The Dalkon Shield

A. H. Robins will pay your doctor or clinic for any examination needed to find out if you are using the Dalkon Shield. If you are, A. H. Robins will pay the cost of having it removed.

WHAT TO DO

If you know you are using a Dalkon Shield IUD, or if you are using an IUD inserted in the early to mid 1970s and are unsure of the kind, call your doctor or health clinic for an appointment. Your call will be in confidence, and there will be no cost to you.

If you have further questions, please call A. H. Robins Company toll free. The number is **1-800-247-7220.** (In Virginia call collect **804-257-2015.**)

A·H·ROBINS
1407 Cummings Drive, Richmond, Virginia 23220